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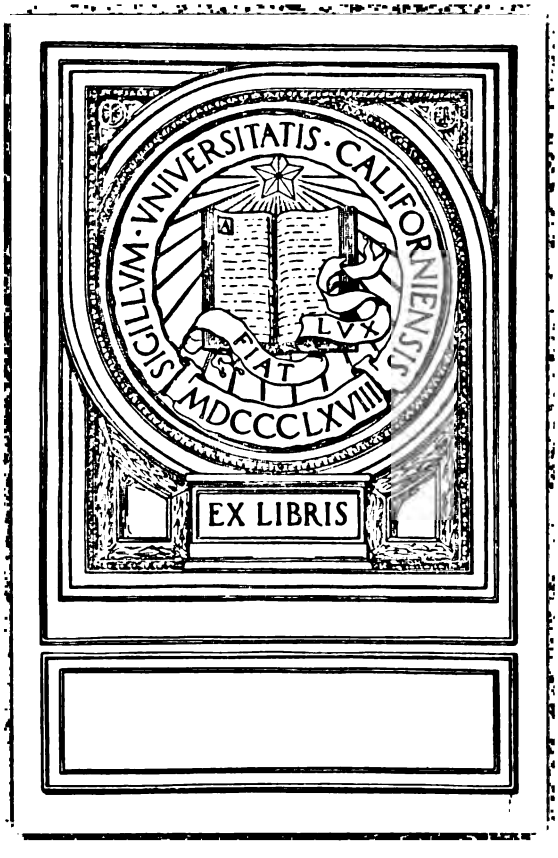

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JOHN MARSHALL

LIFE, CHARACTER AND JUDICIAL SERVICES

As Portrayed in the Centenary and Memorial Addresses and Proceedings Throughout the United States on Marshall Day, 1901, and in the Classic Orations of Binney, Story, Phelps, Waite and Rawle

Compiled and Edited with an Introduction

By

JOHN F. DILLON

ILLUSTRATED WITH PORTRAITS AND FAC-SIMILE

IN THREE VOLUMES

VOLUME II

CHICAGO
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1903

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ILLUSTRATIONS, VOL. II.—EXPLANATORY NOTES.

PORTRAIT OF MARSHALL - - *Frontispiece*

The portrait of the Chief Justice, frontispiece of the present volume, is made after a photograph of an original painting by R. M. Sully. The history of this portrait is thus stated by the present owner, Judge John Barton Payne of Chicago, in a letter to the Editor: "Chief Justice Marshall was a member of the Virginia Constitutional Convention of 1829–30. While in Richmond attending the Convention a committee of that body engaged R. M. Sully to paint his portrait, the plan being to present the portrait to the Convention and through it to the State of Virginia. The portrait was not finished when the Convention adjourned and it remained the property of the artist, and it, together with a portrait of the elder Booth, descended to Mrs. Cole, wife of the Rector of the Episcopal Church at Culpeper Court House, Virginia. After the assassination of President Lincoln the Federal troops slashed the Booth portrait with their sabres and destroyed it. The Marshall portrait was undisturbed and remained in the Cole family at Culpeper until 1891, when it was acquired by me through T. Willoughby Cole of that family, now a resident of Chicago. Conway Robinson, of Virginia, who knew Chief Justice Marshall personally, pronounced this portrait the best likeness of Marshall known. The Sully portrait was exhibited at the World's Fair, Chicago, in 1893; at the Atlanta Exposition, and at the Art Institute in Chicago. It has been photographed but once so far as I am advised and the negative is still in my possession."

RICHMOND HOME - - *Face page 427*

The home of Marshall in Richmond, Virginia, at the corner of Marshall and Ninth streets, was built by the Chief Justice in 1797–98, while he was Envoy to France. Concerning this residence, Mr. Thomas Marshall Smith, a great-grandson of Marshall, writes to the Editor as follows: "The Chief Justice resided here until his death, except when duties of office called him to Washington. The ownership has remained in the family for almost a century, although the dwelling has had other tenants. It is now occupied by his granddaughters, the Misses Harvie, who own it." Mr. Smith says that the picture of the house here reproduced is excellent.

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JOHN MARSHALL MEMORIAL.

STATE OF MARYLAND.

A contemporary account of the proceedings in Maryland states that a large audience assembled at Ford's Grand Opera House, Baltimore, February 4, to celebrate John Marshall Day. The celebration was under the joint auspices of the Maryland State Bar Association and the Bar Association of Baltimore City. The meeting was called to order by Mr. John S. Wirt, and Chief Justice James McSherry was called upon to preside. Rev. W. Strother Jones, of Trenton, N. J., a great-grandson of Chief Justice Marshall, spoke of John Marshall — The Man in eloquent terms and delivered a most instructive address. He was followed by Hon. William Pinkney Whyte, who spoke of Marshall as a Statesman, and the exercises were closed by the address of Mr. Charles J. Bonaparte, on Marshall as Lawyer and Judge. The students of the University of Maryland Law School acted as ushers, and in the evening gave a banquet at the Eutaw House. The Baltimore Bar Association gave a dinner at the Hotel Rennert in the evening.

Address of W. Strother Jones.

Mr. Jones said in part:

John Marshall was a man of note long before he became either statesman or Chief Justice. The gift of

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genius had early been discovered, and it followed him all the days of his life.

It is difficult to speak of him as a man without going into his life as a whole and showing therefrom what he became as a man. The different epochs of his life are so intertwined and mutually dependent that it is difficult to specify with accuracy any line of demarcation.

He was a soldier, scholar, statesman and legislator — all in splendid proportions — before he reached the meridian of life. He was as great as any of the many noble sons of Virginia in a day when Virginia led the Union. In private life abundant evidence is forthcoming that he was a model of what a husband and father ought to be. He was the idol of the household. His children held him in the most affectionate esteem. The servants vied with one another in their desire to serve him. In the long period of the ill-health of Mrs. Marshall the tenderest affection was most markedly manifested. He would permit no one to do for her anything that he could do, and when, on Christmas Day, 1831, she breathed her last, his was a grief only those can know who have been obliged to endure so inexpressible a loss. His letters show the greatest solicitude for his widowed sisters and sisters-in-law and their children.

A word should be said as to his religious convictions. Indeed, in times past, so much has been said that if the half were true he had no religion at all. But would you not call a man religious who said the Lord's Prayer every day? And the prayer he learned at his mother's knee went down with him to the grave. He was a constant and liberal contributor to the support of the Episcopal Church. He never doubted the fact of the Christian revelation, but he was not convinced of the fact of the divinity of Christ till late in life. Then, after refus-

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ing privately to commune, he expressed a desire to do so publicly, and was ready and willing to do so when opportunity should be had. The circumstances of his death only forbade it. In all his life previously he was a constant attendant upon the worship of the church. He kneeled down in the presence of all the people. He was an example of reverence to all his children. He encouraged their joining the church. Like many men, he waited until his mind was convinced, but, unlike many men, he was open to conviction — and God gave it to him with all the joy it afforded. But he was never professedly Unitarian, and he had no place in his heart for either an ancient or a modern agnosticism.

Oration of William Pinkney Whyte on Marshall as a Statesman.

The domestic and private life of John Marshall from the day of his birth, on the 24th of September, 1755, unto the last hour of his mortal existence, has been told by one of his own blood in language most beautiful and full of touching pathos, holding up for the admiration and improvement of posterity an example of great talents, sound morals and exalted virtue — the only basis of a high and honorable fame.

The spectacle of multitudes of professional men and others from every avocation of life gathering in the crowded cities and in the humble towns of this busy land of more than seventy millions of souls, to do homage and reverence to a man for his example as a soldier in Revolutionary days and as a citizen, and for his service as jurist and statesman, at the close of an hundred years after his accession to the high station of Chief Justice of the United States, seems to be a challenge to the assertion that republics are ungrateful.

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It is out of the range of possibility to say anything novel of an illustrious citizen like John Marshall, whose patriotic services and public character have been known of all men for more than half a century, and the record of whose achievements in behalf of his country has become a part of that country's history. Orators and jurists and statesmen, in glowing terms, have portrayed his intellectual power; his urbanity of temper; his absolute lack of knowledge of what men call fear; his unswerving fidelity to duty, and all the other characteristics which secured for him a popularity at home and abroad, second only to that of Washington.

His patriotic services are blended with the events of the Revolution and of the constructive period of the Constitution. To appreciate the man it is necessary briefly to review what has come down to us, as a photograph of his genius, his intellectual vigor, and his combination of powers, which seem, at first, to militate with each other.

Poetry, "the morning dream of great minds: the prelude to thought and the precursor of action," early engaged his overflowing intellect. Men of genius are, rarely, bereft of a love of poetry. The orators of antiquity began their intellectual labor by wooing the Muses. It was deemed a sign of the exuberance of mental vigor; so that it was no eccentricity of nature that in Marshall, with his solid and massive sense, there was room for imagination and poetry. With the eminent men of the times, he laid the foundation for his future usefulness in the study of the highest literature then attainable, and turned with disgust from the trashy novels which, even then, were issued from publication houses. The beginning of his classical knowledge, however, was laid upon very unstable foundations; yet he built thereon a superstructure, by his own unaided labors,

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which served him well during his judicial life. He knew that without great effort nothing worthy was ever achieved, and he gave himself up to the task with a confidence and will that could not be shaken.

His determination to accomplish what he undertook never deserted him during all his life. There was no time in his whole career when he shrank from the performance of his duty. Vanity, too often the weak spot in a great character, had no part in the make-up of this magnificent type of American citizenship.

As a rule great mental power must be joined to strong and energetic physical health. The strain upon the intellectual faculties in continued and laborious exercise must be supplemented by a vigorous constitution. These were the elements of force in Marshall's composition. His early athletic exercises; his prudent and careful mode of life and his temperance, all contributed to his marvelous advancement in the public estimation as a lawyer, a jurist and statesman of rare endowments. It was this that sustained him in his laborious work and preserved, without impairment, to the close of his life, that clear and rarely erring judgment which only strong intellectual faculties could have shown.

Reared in a high region of country, he believed in a strenuous life, and the sports of his youthful companions found him one of their most faithful devotees. His connection with the war of the Revolution has taught us that the life of the soldier, its hardships and its discipline, is a good school for the orator, the judge and the statesman; and so that much which tended to build up for him his masterly leadership among men found its germ in the companionship of the camp. It was there, it is said, he laid the foundation of that undying friendship with Wash-

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ington and of his devoted admiration of Alexander Hamilton, with both of whom, in the later events of life, his destiny was inseparably linked.

The Revolutionary period found him in the condition of assuming "the gown of manhood," and thus, starting upon the high road to win the name of soldier, patriot, jurist and statesman, it was not remarkable that he took a leading part in the stirring scenes of those eventful times. His enrollment among the citizens of his native State to defend their honor and their liberties made him at once a favorite of his people.

It is said that the oracle of the fane of Delphi taught Cicero the great principle of all good men who are called to the service of their country in times of revolution, that the surest road to the most honorable fame is "to follow, always, the dictates of your own conscience and not the opinion of the multitude;" and this was the master guide in the life of the great Marshall. Where, after mature reflection, which was the habit of his contemplative mind, he had assured himself of the correct view which should be taken of any question, he had the courage of his convictions, and he would have perished at the stake rather than surrender them.

It was at the age of twenty-seven years that he began the practice of the law, and unlike so many of the same profession in those days, he did not sit long in the cold shadow of neglect sighing for a brief, but rose rapidly to prominence and secured from the start a large and remunerative clientage.

Army life, and preparation for the trial of the cases which crowded upon him, left him little opportunity, in early life, to study the science of government; but his native talent, his thoughtful consideration of every ques-

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tion to which he gave attention; the knowledge he had acquired of the weakness of the Confederation, moulded his opinions for a strong political system, likely to hold together the sovereign communities in a bond of political union. It was natural that he became an ardent advocate for a Constitution containing restrictions imposed upon the States, and that he should have sustained the party which supported views consonant with his pronounced opinions.

He remembered the sufferings brought upon the army by the inability of the government to provide means to carry on the war, and he devoted his talents and his energies to the obtention of a "more efficient and better organized general government."

It was at the close of the war, in 1782, he entered the General Assembly of Virginia, and the whole country seemed to be on the brink of bankruptcy and desperation. He began his efforts to secure the payment of the public obligations; to hold up the hands of the Federal authority, and to bring about a more perfect consolidation of the interests and affections of the people of all the sections of the country, and this he felt could be best secured by a more comprehensive and efficient general government.

In the effort to settle the various questions of governmental policy there arose in the country two great political parties. The distinctive lines upon which these parties were aligned it is not desirable now to describe; but it suffices to say that Marshall, at that early day, openly avowed his advocacy of a more efficient and better organized national government. This was the guiding principle with him during his whole life, which was dedicated to the preservation of a "limited, constitutional liberty." He was a Federalist, of the highest type of

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that day. When the ratification of the Constitution came before the conventions of the sovereign States, Marshall was a member of the convention of Virginia, and was one of the most earnest advocates of its adoption, for he was enamored of the article which imposed restrictions on the States.

The convention of Virginia was a body of intellectual giants, and the debates upon the questions which arose out of the provisions of the Constitution, were unsurpassed by any convention in her sister States. Marshall himself, who was a logician of the highest order, but not so eloquent as Patrick Henry, yet by his powerful presentation of arguments in support of the power of taxation and of the Federal judicial system, led all the rest.

Under the Confederation, the War of the Revolution had been successfully waged and resulted in the treaty with Great Britain in 1783. The feebleness of the Confederation was soon demonstrated, and in its place the Constitution was ordained and established, in order to "form a more perfect Union."

The revolution of arms had passed away and now a more peaceful and happy revolution had taken its place. This was the "formative period" of our republican government. Time does not permit me to refer in terms to the chaos which existed after the war under the old Articles of Confederation, nor the difficulties encountered by the Fathers of the Revolutionary and Constitutional age in constructing the marvelous machinery by which order was to be secured amid the then conflicting elements of government.

The Articles of Confederation was an agreement of expediency and temporary usefulness, and possessed none of the life and vigor of an efficient permanent govern-

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ment, and, therefore Marshall had favored a convention of the States to ordain a new instrument of union, and supported, with zeal and ardor, the Constitution proposed for ratification by the States.

In the Virginia convention, Marshall's directness and cogent reasoning upon the power granted to Congress to lay taxes for the support of the government; the power given to the President to call out the militia, and the judicial power conferred on the Federal Government, forced him to the front rank as a great logician and statesman of consummate wisdom and ability. "The country was divided into two great political parties; the one of which contemplated America as a Nation, and labored incessantly to invest the Federal head with powers competent to the preservation of the Union. The other attached itself to the State governments; viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members."

The latter party believed that there were no evils which could befall the Federal Government comparable to ills which would follow the surrender of State independence to Federal sovereignty.

Marshall combated these views with all the ardor of a sincere patriotism by the side of Washington, Madison and Edmund Randolph in the convention of Virginia, by which the Constitution was to be ratified or rejected. It passed the trying ordeal by the small majority of ten votes. For the part he took in that memorable contest it has been said: "That he unconsciously prepared for his own glory the imperishable connection which his name now has with its principles."

He maintained that the system of government devised

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by the Constitution was that of a well-regulated democracy, whose maxims, he claimed, were a strict observance of justice and public faith and a steady adherence to virtue. These, he asserted, are the principles of a good government. Down to 1792 he was in and out of the General Assembly of Virginia, while engaged in the most arduous labors of an increased professional practice, but all the while defending the administration of Washington and supporting the same political principles he had avowed from the first.

When the war between France and England, in 1793, was calculated to bring our country into its entanglements, Washington issued his proclamation of neutrality, which inflamed to a high degree the sympathizers with France, and public meetings were called to denounce the action, when Marshall boldly advocated the conduct of the President, as fulfilling absolutely his constitutional duty, and an act designed to keep our people at peace. His support of the Jay treaty and the right of the President to conclude a commercial treaty with a foreign nation was another manifestation of his marked ability as a constitutional lawyer and statesman. His answer to the charge that the President had been guilty of a violation of the power given to Congress "to regulate commerce" bears all the impress of a judicial opinion, more, even, than the argument of a statesman. Such was the feeling in Virginia against the Jay treaty with Great Britain, that, although he was warned of the danger to his popularity, yet he did not hesitate to join the unpopular side of the question.

At the instance of Washington he became a candidate for Congress, and was elected, in spite of very serious opposition. He took his seat at December session, 1799,

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and met the most formidable debaters. It is probable that the House has never held within its walls their equals. In spite of this, he was a leader in all the discussions upon international and constitutional law, and was *facile princeps* in the logical and forceful handling of every topic which bore upon these questions. His masterful argument on the first case of extradition of an alleged criminal under international law, recognized by treaty, gave evidence of inexhaustible learning upon that subject, then a new one to the young republic. In the Nash or Robbins case he maintained in an unanswerable argument that the case came distinctly under the Jay treaty; that it constituted a question exclusively for the executive and not for judicial decision; and that in deciding it the President was not chargeable with an interference with judicial functions. It was a masterpiece of convincing reasoning and constitutional argument.

He had the manliness to separate from his political friends when they were wrong, as firmly as he supported them when they were right. When the second section of the Sedition Act was under discussion in Congress, Marshall showed his absolute independence by separating from his party, and, while not challenging the constitutionality of the Act, he voted for its repeal on the ground that it was inexpedient and unsuited to the temper of the American people.

In 1800, when he became Secretary of State in the Cabinet of President John Adams, his dispatches manifested the highest order of diplomatic discussion and gave entire satisfaction to the country that his qualifications for that post had not been overrated.

The friendship which had before existed between Marshall and Adams was now to be broadened into a tie

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of far more importance than the intimacy of personal association; for, from that time forth, these names were to be linked together in the constitutional and juridical history of the country. It was well known that Marshall had little ambition for political preferment; on the contrary, he had a repugnance to a political career. He had entered politics largely against his will and only from a sense of patriotic duty.

Marshall had naturally a legal mind, and at the time he came to the bar he was not confronted with a deluge of discordant decisions nor with the many questions of commercial law which has advanced in the past century into a department of the law itself. He had to lay the foundation of his legal learning deep in the common law, which came to us from the mother country, and with the text-books of that day, and the decisions from Westminster Hall, he acquired a vast amount of technical learning, which it is difficult to acquire from case study of the present time. His arguments at the bar evinced the depth of his technical knowledge as well as the strength of his wisdom.

In November, 1800, Chief Justice Ellsworth, then in Europe, resigned, and, it is said, that the President meeting Marshall, who had suggested some name for the office, replied "that he intended to appoint a plain Virginia lawyer named John Marshall." It fairly took Marshall's breath away. He was but forty-five years of age when he rose to the high place of "Chief Justice of the United States." Mr. Pinkney said of him: "That he was born to be the Chief Justice of any country in which he lived," and indeed it seemed as if the judicial ermine had fallen on his shoulders by natural inheritance.

This tribunal, in the trial of great national causes, was

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to be the field in which he would display that high order of statesmanship which was to strengthen the arm of the Federal Government, and give his patriotic heart ample scope for perfecting that Union he so dearly loved. It was a tribunal in which conflicting sovereign claims would pass in peaceful judicial review, whose decree would be a "pledge of the immortality of the Union, of the perpetuity of national strength and glory, increasing and brightening with age, of concord at home and reputation abroad." He was even more the judge than the advocate. He had none of the arts of the rhetorician. His ability to deal with great legal problems was a self-evident fact, and the simplicity with which he disposed of them was more powerful than if his opinions were clothed in the most ornate diction of the orator. Such was the constitution of his mind and his early education that he was able to draw arguments *a priori* from "the spirit of the laws and from the natural foundations of justice."

While it is as a judge that his services to his country chiefly won their gratitude, yet his judicial labors were so constantly devoted to expounding the Constitution in the "constructive period" that his character, as jurist and statesman, are inseparably blended. It was his good fortune and a blessing to his country that during his service on the Supreme Bench so many important constitutional questions were forever settled.

He was a man who believed that public office was a public trust, and amid all the rancor of party politics, in those early days of strife, the breath of slander never cast a stain upon his spotless reputation. It has been said that in him virtue seemed to have its visible representative. It was in that great tribunal the meditative,

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logical, reasoning power of his great mind was to be developed; there the courage of his convictions was to be displayed; there the force of his noble character was to silence disturbance and bring to the decisions of that "Amphictyonic Council" the acquiescence and reverence which the fathers of the country had designed in its creation.

It was a curious incident that among his colleagues in that supreme tribunal he found his old compatriot in arms, Mr. Justice Washington, who, like himself, was a man of sterling integrity, who never knew the fear of any human being and who never saw aught before him but his duty.

Marshall was a great Chief Justice, "and had a greater one appeared during the past century it would have been a miracle."

He has been described as a "contemplative genius," without imagination and with little of emotion; but those who knew him best have given evidence of the impression which speeches, highly ornate in language and in metaphor, made upon him in the trials in the Supreme Court, and at times, under such influence, the language of the opinions of the Chief Justice would depart from their accustomed simplicity into the realm of scholastic embellishment. Judge Story, in one of his letters, when he first saw him, thus described him:

"He possesses great subtlety of mind, but it is only occasionally exhibited. His good temper and unwearied patience are equally agreeable on the bench and in the study. His genius is, in my opinion, vigorous and powerful, less rapid than discriminating, and less vivid than uniform in its light. He examines the intricacies of a subject with calm and persevering circumspection, and unravels the mysteries with irresistible acuteness. He

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has not the majesty and compactness of thought of Dr. Johnson; but in subtle logic he is no unworthy disciple of David Hume."

It must be borne in mind that when he came into the Supreme Court constitutional law was in its infancy; for that court had rarely been called upon to expound any of the provisions of our own Constitution.

The idea of the Supreme Court having power to set aside legislative acts as unconstitutional and void had not then found lodgment in the public mind. The fact that the Supreme Court was to interpret the provisions of the Constitution, and its decision was to be final, was a new departure. These questions were numerous and difficult of solution.

"Whether the right of Congress to pass all laws 'necessary and proper' for the Federal Government was not restricted to such as were indispensable to that end: whether the right of taxation could be exercised by a State against creations of the Federal Government: whether a Federal court could revise the judgment of a State court in a case arising under the Constitution and laws of the United States: whether the officers of the Federal Government could be protected against State interference: how far extended the power of Congress to regulate commerce within the States: how far to regulate foreign commerce as against State enactment: how far extended the prohibition to the States against emitting bills of credit,"—these and cognate questions vital to the prosperity and life of the American people under their republican form of government were entirely without precedent.

Confronted with these gigantic problems, it is plain to see that Marshall's statesmanship was to be more fully

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developed on the Bench and not in the councils of the Nation.

The time justly allowed for the consideration of the title of the Chief Justice to that of statesman is too limited to refer to the many cases in which he illustrated the fact that he was indeed a constitutional lawyer, jurist and statesman, all combined. The cases of Marbury and Madison, in which he pronounced the decision that a law repugnant to the Constitution is void: *Ex parte* Bollman and Swartwout, and The United States *v.* Burr, wherein he gave the definition of treason in the sense of the Constitution: McCulloch *v.* Maryland, where an act of the Maryland legislature, imposing a tax on the Bank of the United States, was declared unconstitutional and void: Dartmouth College *v.* Woodward, where an act of the legislature of New Hampshire, increasing the number of the trustees of that college, was declared unconstitutional as impairing the obligation of a contract, and the well-known case of Gibbons *v.* Ogden, where it is declared that the Constitution of the United States contains an enumeration of the powers expressly granted by the people to their government; that under the power given to Congress to "regulate commerce" a steamboat may be licensed, pursuant to an act of Congress "for the enrolling and licensing of steamboats," and an act of a State inhibiting the use of steam to any vessel having a license comes into direct collision with that act of Congress, and, of course, is void,— all evince the grasp of intellect of the Chief Justice in dealing with large constitutional questions.

Nothing shows more clearly than the close of this opinion, which was delivered by the Chief Justice at the February term, 1824, how the principles which he had

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supported in early life, and during his eventful career, crop out as distinctly as ever in this judicial opinion. His constitutional views remained as steady as the needle to the pole.

During the thirty-four years of his judicial life, Marshall was called upon to expound the Constitution upon the lines in which he believed that great instrument had been framed, and in such construction, as in his judgment, its spirit led in the advancement of good government and for the prosperity of this people.

Such a man, who has won great honor as a soldier, a statesman, and a jurist, has not only deserved well of his country, but shall live in cherished memory as long as the republic shall endure.

Oration of Charles J. Bonaparte on Marshall as Lawyer and Judge, and Marshall's Conception of the Judicial Office.

For all time, Marshall is our great Chief Justice: as such he lives to-day in American jurisprudence; his words yet inspire, his mind yet moulds our judgment, our laws, the very thoughts of our people. He is so completely *the* Chief Justice, not only of our national history, but of our daily national life, that to think of him otherwise than as Chief Justice calls for a conscious effort. We half assume that for us, at least, his life began one hundred years ago when, at the age of forty-six, he was installed as the first Magistrate of our first Court. But the forty-six years he had then lived made up a life so busy, so useful and so honorable that had it ended a century since, he were yet one among those few men of whom all Americans may reasonably be proud, to whom all Americans may justly be grateful. In youth a faithful

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and gallant soldier, in early and mature manhood a citizen called again and again to arduous public service, he was also, when chosen for his great office, one of the most eminent and the most honored lawyers of his time.

His success at the bar was not the fruit of any marked advantages in legal education: so far as is known, a single course of lectures at William and Mary College, delivered by Mr. Wythe, afterwards Chancellor, supplemented by such meagre opportunities for private study as were afforded by a few months' intermission in his military career, sufficed to qualify him for a license to practice. Indeed, although one so well fitted as Horace Binney[1] to speak on the subject has said of him:

"His learning was great and his faculty of applying it of the very first order."

There can be little doubt that the second part of this description is far more accurate than the first, and that his truly wonderful skill in making use of what he knew led those who heard him to believe, often against his own disclaimer, that he knew far more than his well filled life had ever left him time to learn. Justice Story, his colleague for nearly a quarter of a century, thus admirably depicts[2] his character and acquirements:

"That he possessed an uncommon share of juridical learning would naturally be presumed from his large experience and inexhaustible diligence. Yet it is due to truth as well as to his memory to declare that his jurid-

[1] Eulogy on John Marshall, by Horace Binney, delivered at Philadelphia, September 24, 1835, reprinted by Callaghan & Co., p. 44, 1900. [See *post*, Vol. III, 281.]

[2] Life, Character and Services of Chief Justice Marshall, a discourse pronounced on October 15, 1835, at the request of the Suffolk (Mass.) Bar, by Mr. Justice Story, reprinted by Lawyers Co-operative Publishing Company, p. 54, 1900. [See *post*, Vol. III, 827.]

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ical learning was not equal to that of many of the great masters in his profession, living or dead, at home or abroad. He yielded at once to their superiority of knowledge, as well in the modern as in the ancient law. . . . The original bias, as well as the choice, of his mind was to general principles and comprehensive views, rather than to technical or recondite learning. He loved to expatiate upon the theory of equity; to gather up the expansive doctrines of commercial jurisprudence; and to give a rational cast even to the most subtle dogmas of the common law. . . It was a matter of surprise to see how easily he grasped the leading principles of a case and cleared it of all its accidental incumbrances; how readily he evolved the true points of the controversy, even when it was manifest that he never before had caught even a glimpse of the learning upon which it depended. He seized, as it were, by intuition the very spirit of juridical doctrines, though cased up in the armor of centuries; and he discussed authorities as if the very minds of the judges themselves stood disembodied before him."

No one, in fact, can have read intelligently Marshall's opinions without noting how sparingly he refers to authorities in support of his views: in the vast majority of instances he speaks of adjudged cases only to distinguish them from that before the court. A single decision, at most two or three, always, however, strictly apposite, will be occasionally cited, but any one of many modern opinions, dealing with questions of incalculably less importance and less difficulty, contains more citations than the aggregate of all he delivered during thirty-five years.

With his accustomed modesty, he himself ascribed his almost immediate rise to distinction in the courts of his

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native State to "the too partial regard of his former companions in arms, who, at the end of the war, had returned to their families;" nor is it unlikely that their well merited esteem aided him in no small measure to mount those first rounds of the ladder which young lawyers find so hard to climb. Although only nineteen when he entered the army and twenty-five when he left it, he appears to have gained, in surprising fullness for one so young, the confidence and respect as well as the affection of his brother officers. He was their adviser in perplexities, the arbiter of their differences, the composer of their quarrels: the task of a peacemaker was always a labor of love to him. In those early days he showed the same gentleness and simplicity, the same command of his passions and the same profound wisdom, no less than the same cheerful patience, the same inflexible courage, which ever marked his public and private life. It is in no wise unlikely that among those who had thus known him in the camp were found the first who asked him to serve them in the forum.

It is likewise probable that one phase of his military experience was of great value in his training for the bar. He filled for some time the office of Deputy Judge Advocate in the Continental army, and we may more readily believe that he so discharged its duties as to gain the esteem and friendship of Washington and Hamilton and the admiration of the entire service, because it would be hard to imagine one better fitted by nature for this position. His acute and vigorous intellect, his calm, judicial temper and his unfailing charity for the weak and erring marked him out, of all men, as one to be at once adviser to a court of laymen, public prosecutor and the prisoner's friend; and it may be doubted whether attendance for another term at

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Chancellor Wythe's lectures would have done as much to make his clients' interests safe in his keeping as did this practical training in the unveiling of truth, the clearing of innocence from mistake or calumny, and the adjustment of punishment to guilt.

Marshall's professional career was repeatedly sacrificed to the public interest. In these days we smile when told that an office has sought the man who fills it, smile somewhat sadly, somewhat bitterly; why, we know too well; but in his life we see this done, not once but often, not in semblance but in grave and painful truth. A man of very moderate fortune, with many just and heavy calls upon his means, he frequently interrupted his lucrative practice, sometimes altogether, sometimes in great part, to serve his fellow-countrymen in exigencies which, to his mind, left no choice, always to strengthen his claims to their gratitude, but always to leave him, in worldly goods, a poorer man. He refused public service whenever his conscience tolerated the refusal; he declined to be Attorney-General, Minister to France, Associate Justice of the Supreme Court; he announced more than once his permanent retirement from public life and his purpose to devote himself thereafter to the practice of his profession; in the words of Binney:[1]

"Office, power and public honors he never sought. They sought him, and never found him prepared to welcome them, except as a sense of duty commanded."

But the same "sense of duty" which had once bidden him draw his sword in his country's cause forbade him to stand aloof whenever he was called, too clearly for his modesty to question the call, to serve her in peace as he had served her in war; and this was too often for his

[1] Eulogy, p. 38. *Post*, Vol. III, 305.

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trariety of opinion respecting it. Every argument proving the necessity of the department proves also the propriety of giving this extent to it. We do not mean to say that the jurisdiction of the courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say that this fitness furnishes an argument in construing the Constitution which ought never to be overlooked, and which is most especially entitled to consideration when we are inquiring whether the words of the instrument which purport to establish this principle shall be contracted for the purpose of destroying it."

His meaning is made clearer by his language in the well-known case of Marbury *v.* Madison, decided eighteen years before. He said then:[1]

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

The doctrine he then asserted with such emphasis, which he treated later as "a political axiom," had been, at least in its practical application, vehemently denied in the earlier days of our government, and it is denied with no less passion to-day by aliens to the spirit of the American polity. That courts of law are the best instruments, nay that they are the only good instruments, to determine all controversies and vindicate all rights affecting the

[1] 1 Cranch, 163.

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persons and estates of freemen he deemed an axiomatic truth, but when he took his seat as Chief Justice a great political party looked on the judiciary, and, most of all, on the Federal judiciary, with dislike and suspicion as a check upon popular omnipotence, and, in our own time, we see the same jealousy shown by socialistic innovators. Marshall thoroughly approved of, I will not say "government by injunction," for the term is both inadequate and misleading, but of the very widest field for judicial action and judicial influence, whether invoked to protect individual rights or to enforce public obligations. Of this no better illustration can be found than his course in the case of Marbury *v.* Madison, above mentioned. That case is best known as the first wherein an Act of Congress was pronounced void, because unconstitutional, by the Supreme Court, but it is no less worthy of note in another aspect. When it became known at the seat of government that President Adams had been defeated as a candidate for re-election, the Federalists, who, for the moment, controlled all branches of the National Government, were tempted to abuse the brief period of supremacy left them for purposes of selfish and short-sighted partisan advantage. In this spirit they created a number of new offices which the retiring President hurriedly filled with incumbents belonging to his own party, and among these were certain justices of the peace for the District of Columbia appointed for five years. The act providing for their appointment was approved on February 27, 1801; on March 2d President Adams nominated Mr. William Marbury and three others for the position thus established, late in the evening of the 3d they were confirmed by the Senate, and but a few minutes before midnight their commissions were signed and sealed: these

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had not been delivered when Mr. Madison became Secretary of State, and passed into his possession. This action of the Federalist President and Congress was unfair, unbecoming and, as events showed, gravely impolitic: in fact the indecorous attempt thus made to preserve patronage for a defeated party went far to convert its defeat into irremediable ruin; but the whole proceeding had been strictly legal, and the "Midnight Judges" were fully and clearly entitled to their offices; these might be abolished by the new Congress, but, while they existed, they had been legally filled. Unhappily, by a deplorable law of human nature, partisan excesses on one side breed the like or worse excesses on the other: President Jefferson refused to recognize the appointments and forbade Mr. Madison to deliver the commissions. Madison obeyed, and the justices applied to the Supreme Court for a *mandamus* to enforce their delivery.

Marshall had been nominated by the same President, confirmed by the same Senate, barely a month before their commissions were signed; he was known as a strong Federalist, although his moderation and sagacity had led him to oppose the extreme faction of his party; moreover, Jefferson was the only public man, and probably the only individual, in Virginia with whom his personal relations were notoriously cold to the verge of hostility. He fully recognized the duty of a judge, not only to merit, but, so far as prudence might avail, to gain and retain public confidence, to seem impartial no less than to be impartial. Had he been an ordinary man he might well have been embarrassed when called to pass on the merits of this cause; had he been an ordinary judge he must have gladly taken any becoming way to escape the responsibility of such decision. And a becoming way was

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open to him: the court were unanimously of opinion that so much of the thirteenth section of the Judiciary Act as authorized the Supreme Court "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any . . . persons holding office under the authority of the United States," was void in that it attempted to confer on the court an original jurisdiction not authorized by the Constitution: he had but to announce this determination, in itself one of extreme moment, and any further discussion of the petitioners' rights or remedies became needless and might be deemed irrelevant.

Such might, such probably would, have been the course of the average man and of the average judge: such emphatically was not the course of Marshall. He always sought to determine a controversy, never to avoid its determination: his aim was ever to decide a cause, not to be rid of it without decision. And with him this was not a matter of temperament or policy, it was a matter of conscience and honor He said in his charge to the jury which reluctantly acquitted Burr of treason:[1]

"That this court dares not usurp power, is most true. That this court dares not shrink from its duty, is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case; if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well

[1] United States v. Burr, 25 Fed. Cases, 179.

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as the indignation of his country who can hesitate which to embrace."

Acting on this principle before he had thus announced it, he did not hesitate to point out in a masterly opinion that Mr. Marbury's appointment to office was in all respects complete; that his commission belonged to him as a muniment of title; that the various excuses alleged for withholding it were mere sophistry; that the Secretary of State was strictly bound by law to give it to him; and that, if he failed to discharge this ministerial legal duty, an appropriate tribunal of first instance ought to compel its performance by *mandamus*. His distinction between the different classes of duties which may be imposed by law upon the head of a department of government, as affecting his liability to control by *mandamus*, deserves quotation, if for no other reason, because of the form of his reference, the only reference to be found in the opinion, to President Jefferson's notorious responsibility for Mr. Madison's failure to transmit the commissions. He says as to this:

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will, it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation. But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, *and the performance of which the President cannot lawfully forbid, and therefore*

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is never presumed to have forbidden; as, for example, to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record,— in such case it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual than if the same services were to be performed by a person not the head of a department."

His course in this instance, as afterwards in the trial of Burr, provoked, as in each case he clearly foresaw that it would provoke, a violent partisan clamor; but, in the words of Mr. Rawle:[1]

"The judge was unmoved by criticism, no matter from what quarter, and was content to await the judgment of posterity that never was the law, as then it stood and bound both parties, interpreted with more impartiality."

We may safely claim even more. Posterity has not merely owned the worthiness of Marshall's words and thoughts; it has recognized his words as true and made his thought its own. Americans are essentially and emphatically a judge-ruled people; in last resort we look to our courts to guard public order and tranquillity, no less than individual safety and happiness. Again and again it has been shown that in an American community no violence of party spirit or popular excitement can withstand the moral influence of judicial condemnation: with us those who feel that the courts are against them, feel that, whatever its merits, their cause is lost. Foreigners in birth or spirit who would here fan into flame those jeal-

[1] Oration of William Henry Rawle, on the occasion of the unveiling of the bronze statue of Chief Justice Marshall, at Washington, May 10, 1884, republished by T. H. Flood & Co., page 50 (1900); 112 U. S. Rep., p. 748. [See *post*, Vol. III, 408.]

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ousies and hatreds of class and station which in other lands smoulder fiercely beneath the pressure of the State's military strength, find in the safeguard to peace and social order thus furnished by our reverence for courts of law a stumbling block which perplexes and baffles them; communistic doctrines take little root; communistic experiments can never be hopeful in a society which accepts as the ultimate arbiter of individual rights, not itself, but a few among its members removed, wholly in theory, so far as human frailty may permit and human wisdom may devise in proper practice, from the passions and prejudices of the moment.

A few years since the United States, one of the great powers, in latent strength probably the greatest power of the world, came as a civil suitor into one of its own courts to ask that some among its citizens be forbidden by judicial mandate to hinder its discharge of duties imposed on it by the Constitution. It is quite safe to say that in no other country of the world could this have happened; even in England it had seemed strange, elsewhere it had seemed ridiculous. Yet when the court had spoken as it was prayed to speak, when those responsible for the disorders which then gravely menaced the public peace were told by a judge through a writ that their course was unlawful, and a few, who persisted after warning, were called to answer for contempt of court, all the seething social mutiny subsided as by magic. In the words of one of the defendants[1] in that case:

"It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. . . . The men went back to work, and the ranks were

[1] In the Matter of Debs, Petitioner, 158 U. S. 597.

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broken, and the strike was broken up, . . . not by the army, and not by any power, but simply and solely by the action of the United States court."

Or, as the Supreme Court says,[1] commenting upon this testimony:

"Whatever any single individual may have thought or planned, the great body of those who were engaged in these transactions contemplated neither rebellion nor revolution, and when, in the due order of legal proceedings, the question of right and wrong was submitted to the courts, and by them decided, they unhesitatingly yielded to their decision. The outcome, by the very testimony of the defendants, attests the wisdom of the course pursued by the Government, and that it was well not to oppose force simply by force, but to invoke the jurisdiction and judgment of those tribunals to whom, by the Constitution and in accordance with the settled conviction of all citizens, is committed the determination of questions of right and wrong between individuals, masses and States."

Marshall would have recognized in this peaceful submission to the law judicially announced a vindication for his lifelong beliefs, and his voice might almost seem to speak again in other passages[2] of the same opinion:

"The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all National powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises the army of the Nation, and all its militia,

[1] 158 U. S. 598. [2] 158 U. S. 582.

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are at the service of the Nation to compel obedience to its laws.

"But is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the Nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with, nor does it destroy, the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result."

Marshall's belief that the courts ought always to determine, once for all, and in such wise as to set them forever at rest, all controversies submitted to legal arbitrament made him seek eagerly all possible light before the decision. In the words of Story:[1]

"He was solicitous to hear arguments; and not to decide causes without them. And no judge ever profited more by them. No matter whether the subject was new or old; familiar to his thoughts, or remote from them; buried under a mass of obsolete learning, or developed for the first time yesterday; whatever was its nature, he courted argument, nay, he demanded it."

Binney says[2] of him:

"He was endued by nature with a patience that was never surpassed; patience to hear that which he knew already, that which he disapproved, that which ques-

[1] Discourse, p. 54. *Post*, Vol. III, 377.

[2] Eulogy, p. 43. *Post*, Vol. III, 316.

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tioned himself. . . . Whether the argument was animated or dull, instructive or superficial, the regard of his expressive eye was an assurance that nothing that ought to affect the cause was lost by inattention or indifference."

No judge ever more clearly realized that patience and courtesy are not merely judicial virtues, but judicial duties, or that those least willing to profit by argument are those also having least reason to feel confidence in their ability to dispense with it. And his profound, indeed religious, sense of the wide scope, exalted dignity and consequent overwhelming responsibility of the judicial office made him, perhaps of all judges known to our history, the most scrupulous in his inflexible fairness. Speaking in the Virginia Convention of 1829, he said:[1]

"Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting — between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that in the performance of these duties he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security, and the security of his property, depends upon that fairness? The judicial department comes home in its effects to every man's fireside — it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to control him but God and his conscience?"

Never was the carriage which he thus extolled more clearly illustrated than by himself in the famous trial of

[1] Eulogy, p. 50. *Post*, Vol. III, 323.

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Burr, to which I have already alluded. The mind can scarcely conceive of a greater contrast than was there presented by the presiding judge, ever a model of integrity, of morality, of self-restraint, faultless in every relation of public and private life, to the brilliant, seductive, unprincipled profligate, wrecked in fortune, reputation and happiness, who stood before him a prisoner. And Marshall must have been either more or less than a man if he could then forget that Burr's hands were red with the blood of one of his best and oldest friends, of a soldier and statesman for whose virtues, talents and services he had ever expressed as he had ever entertained heartfelt admiration. Nor would any one regard with greater reprobation the wild scheme of reckless violence and disorderly ambition which Burr's desperation had conceived and his abilities found means to set on foot than the Chief Justice whose whole life had been ever marked by unfailing disinterestedness, moderation and obedience to law. Yet no trace, however faint, of any perception that he had before him a man of evil deeds and worse repute, the corrupter of public as of private morals, the disturber of the Nation's tranquillity, the slayer of Hamilton, can be found in any of his successive adjudications, each concluding a fierce and protracted forensic struggle, which marked the several stages of that memorable trial: never was justice more carefully blinded to aught beyond the poise of her scales. When the jury rendered the significant verdict:[1]

"We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty."

[1] 25 Fed. Cases, 180.

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And, in reply to the query of the traverser's counsel, Mr. Luther Martin:[1]

"Did they wish to have the verdict entered in this form on the record, as a censure on the court for suppressing irrelevant testimony?"

One of the jury said:[2]

"If he were to be sent back he would find the same verdict: they all knew that it was not in the usual form; but it was more satisfactory to the jury as they had found it; and he would not agree to alter it."

Marshall well knew that these were but tokens that the American people had convicted Burr as his country's enemy, a conviction destined to cloud and poison his dishonored old age with a weightier penalty than death itself, but to the judge this was as nothing. It was his business, beyond all else his business, to stand between a prisoner, however gravely the latter's conscience might be charged with wrongs to God and man, and one of those popular judgments which had sent Aristides into exile and put the hemlock to the lips of Socrates. He met the implied censure of the jury with the calm, simple dignity he always showed. In the words of the record:[3]

"The court then decided that the verdict should remain as found by the jury; and . . . the Chief Justice politely thanked the jury for their patient attention during the whole course of this long trial, and then discharged them."

He was willing that the prosecuting counsel should say in anger, yet with truth: "Marshall has stepped in between Burr and death," for he had been called upon to say, not whether Burr deserved death, but whether, under the evidence, he deserved death as a traitor, as a traitor in

[1] 25 Fed. Cases, 180. [2] Ibid. [3] 25 Fed. Cases, 181.

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has excited the surprise of the most learned and acute observer. De Tocqueville[1] wrote:

"Je ne pense pas que jusqu'a présent aucune nation du monde ait constitué le pouvoir judiciaire de la meme manière que les Américains."

And, many years later, Sir Henry Maine[2] added:

"The success of this experiment has blinded men to its novelty. There is no exact precedent for it, either in the ancient or the modern world. The builders of constitutions have, of course, foreseen the violation of constitutional rules, but they have generally sought for an exclusive remedy, not in the civil, but in the criminal law, through the impeachment of the offender. And, in popular governments, fear or jealousy of an authority not directly delegated by the people has too often caused the difficulty to be left for settlement to chance or to the arbitrament of arms."

Nor does it require a less effort of mind to realize how profoundly the immense success of this great "experiment" has changed the situation of our country and the thoughts of mankind. In the words of Justice Story:[3]

"We have witnessed the solid growth and prosperity of the whole country under the auspices of the National Government, to an extent never even imagined by its warmest friends. . . . We have seen all these things; and we can scarcely believe that there were days and nights, nay, months and years, in which our wisest patriots and statesmen sat down in anxious meditations to devise the measures which should save the country from impending ruin."

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[1] Démocratie en Amérique, tome I, ch. VI.

[2] Popular Government, p. 218.

[3] Discourse, pp. 24, 25. *Post*, Vol. III, 346.

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Horace Binney[1] exclaims:

"What were the States before the Union? The hope of their ememies, the fear of their friends, and arrested only by the Constitution from becoming the shame of the world."

Sir Henry Maine[2] remarks:

"It is not at all easy to bring home to the men of the present day how low the credit of republics had sunk before the establishment of the United States. . . . The Federal Constitution has survived the mockery of itself in France and in Spanish America. Its success has been so great and striking that men have almost forgotten that, if the whole of the known experiments of mankind in government be looked at together, there has been no form of government so unsuccessful as the republican."

The vast and salutary change which has thus given hope to the world and replaced a spectacle of what was weakest and most disheartening in human society by a spectacle of national greatness and popular happiness at which mankind wonders has been doubtless due, under Divine Providence, to many of our institutions and to many of our public men, but it has been the work of no institution so visibly as of the Supreme Court of the United States, and of no man, unless it be of Washington, so indisputably as of John Marshall.

This eminent magistrate, unmoved by the obloquy or clamor of his day, was yet mindful of the voice of history. In the words of Lord Mansfield, applied to him by Story:[3]

"He wished for popularity; that popularity which

[1] Eulogy, p. 46. *Post*, Vol. III, 320.

[2] Popular Government, pp. 198, 202.

[3] Discourse, p. 44. *Post*, Vol. III, 366.

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follows, not that which is run after; that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends by noble means."

Or, as Story himself[1] says:

"He aspired to that fame which is enduring and may justly be conferred by future ages; not to that fame which swells with the triumphs of the day, and dies away long before it can reach the rising generation."

And what he wished for, that he has. Of all the men in high office who listen to-day to his eulogies, how many, I ask you, will have life, will have even being, in the thoughts of their countrymen sixty-six, or even six, years after their earthly lives have closed? Which one of those now powerful and prominent in the land can hope, with reason, to be more than a swiftly-fading memory, more than a name men have already half forgotten a single year after his epitaph has been graven on his tomb? In the vast whirring, crashing bustle of modern industrial civilization, flitting shapes of transitory dignity hurry by us from one abyss of oblivion to another and are gone ere we well know that they are: who will think a century's, nay, a generation's, space hence of our country's rulers of to-day? How many among her rulers in the days of my own childhood, even of my early manhood, can be recalled, save by an effort of memory, now? Yet from this chaos of forgotten mediocrity a few names, a few lives stand forth gaining, instead of losing, in distinctness and stature as the years roll by, growing into their true and lasting greatness as Time sweeps into his rubbish heap all the false and transient eminence of petty men beside them. And the figure of the great Chief Justice, of the man who made our Constitution the liv-

[1] Discourse, p. 44. *Post*, Vol. III, 366.

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ing bulwark of our orderly freedom, who taught our courts their full mission and our people to trust in our courts, who, in himself, left us a model for all judges and an object of reverence for all men, that figure will endure a breathing, speaking guide to the thoughts and acts and lives of Americans while America is yet great and yet worthy of her greatness, while the justice of her courts is yet the justice of righteousness.

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STATE OF WEST VIRGINIA.

A celebration was held in West Virginia by the State Bar Association at their regular annual meeting at Parkersburg. The meeting was held in the Auditorium at two o'clock p. m. on the 4th of February, 1901. The Auditorium was filled to its entire capacity by a large audience of ladies and gentlemen invited from all parts of the State, members of the local bar and of the State Bar Association, including the venerable John J. Jackson, of the District Court of the United States, who was appointed by President Lincoln and holds the oldest commission among the Federal judges; Hon. M. H. Dent, of the Supreme Court of West Virginia; Hon. Alston G. Dayton, Hon. L. N. Tavenner, and others in the public service, as well as local officials. Henry M. Russell, of Wheeling, presided in the absence of L. J. Williams, of Lewisburg, the President of the Association; and without a formal address introduced the orator of the occasion, the Hon. Henry Billings Brown, Associate Justice of the Supreme Court of the United States.

Oration of Justice Brown.

It is scarcely too much to say that the history of the Supreme Court of the United States, as the recognized mouth-piece of the Constitution, began with the installation of John Marshall as its Chief Justice one hundred years ago to-day. It is true that the court had been in existence eleven years. But no case was decided upon its merits for the first three years after its organization, and

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the cases finally disposed of during those eleven years did not exceed forty in number. But one important constitutional question was passed upon, and the people were so little pleased with the decision that they promptly overrode it by an amendment to the Constitution. The court had not even a reporter. Prior to Marshall's accession, its reports were published as an appendix to Dallas' reports of the Supreme Court of Pennsylvania. Such reports are contained in 330 pages of Curtis' Decisions, while 2,400 pages are now necessary for the reports of a single term.

The importance of the court was greatly underestimated by the people and by the legal profession. Even the Chief-Justiceship was so little thought of that Jay resigned it to become Governor of New York, and subsequently declined a reappointment, to retire to private life. Rutledge resigned his position as Associate Justice to become Chief Justice of South Carolina. Robert H. Harrison hesitated long between a seat upon the Supreme bench and the Chancellorship of Maryland, and finally decided in favor of the latter, though he lived but a few months thereafter.

Marshall, however, had scarcely taken his seat upon the bench when the first of that series of constitutional cases (Marbury *v.* Madison) which were to make his name immortal was called to the attention of the court. With that case Marshall may be said to have entered upon his career as the expounder of the Constitution.

The great charter of our Federal Government, the Constitution of the United States, comparatively recent as it is, is believed to be, with the single exception of the Constitution of Massachusetts, the oldest written scheme of a National Government now in existence. While there are

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many governments which are far older than our own,— indeed we may be said to belong to the younger generation of powers,— they are governments of tradition and growth, as distinguished from a government of premeditated and carefully considered design.

Had the Constitution no other title to our admiration than the mere fact that it has outlived all its contemporaries, survived the shock of a great civil war, and after the experience of a century remains substantially without alteration, the fundamental law of the land, it would be sufficient of itself to demonstrate its superiority to every other similar instrument. Its history in this particular forms a striking contrast to the experience of other countries. Since its adoption in 1789 the people of France have lived under no less than nine different constitutions; the people of Switzerland under four; the people of Spain under four; while there is scarcely a civilized nation in Europe that has not, within the past century, adopted and thrown aside a Constitution modeled to a greater or less extent upon our own. Indeed, it is scarcely too much to say that the whole continent of Europe is strewn with the wrecks of Constitutions which in their day were thought to represent the consummate flower of human wisdom, but which needed only the stress of civil war, or, perchance, a mob in the streets, or even an adverse vote in the legislature, to demonstrate their inefficiency.

If we were to inquire why this marvelous instrument has accomplished so much, it will be found in the fact that its framers set out to accomplish so little. The delegates to the Constitutional Convention were not theorists. They had no thought of turning their backs upon the past, and evolving a model government from their inner consciousness. They had but one idea, and that was,

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in their own language, "to form a more perfect union" between the States than was possible under the old Confederation. The preamble mentions other objects, but they were all subordinate to this. They wished only a working, practical government, representing not the dreams of enthusiasts, but the traditions which the people had inherited from their mother country, the experience of the several colonies under their charters, and the average wisdom of the delegates. They did not even enter upon their task willingly; but were driven to it by a stern necessity growing out of the utter failure of the Confederation, and the determination that this great continent, which it required no prophetic eye to see they were about to enter upon and possess, should not fritter away its strength in petty states, each with its own commercial system, and intent only upon securing its own prosperity at the expense of its neighbors.

The Constitution they framed is now almost universally regarded as embodying the best possible form of government for this country, and is revered as something too sacred to be trifled with or even criticised. It must not, however, be supposed that it was originally received with acclamation or adopted without strong opposition. The necessity of a union of the States, and the impossibility of holding them together under the Articles of Confederation, were freely conceded. A new Constitution was imperative, or the union of the thirteen colonies must go to pieces. The matter was discussed for months and years before a convention was called. The debates of that convention have not been preserved, but it is known that they were fierce and bitter. George Washington was its president, and the ablest and most experienced men in the country had been sent to it as delegates

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from the several States. They were men who had signed the Declaration of Independence; men who had fought in the Revolution; members of the Continental Congress, and of the State legislatures.

There were two difficulties arising from opposite directions which threatened to render the whole scheme abortive. Upon the one hand, there was hatred of the British Crown and Parliament, and a fear lest the new government, which was to take its place, should prove too strong for the independence of the States; and, upon the other hand, there was a frank confession of the impotency of the old Confederation, and a conviction that a strong central government was absolutely essential to the great nation they proposed to found. There was also a feeling of jealousy between the larger and smaller States, and a fear that such little communities as Rhode Island and Delaware (Nevada had not yet been dreamed of) might be lost in a union with the great Commonwealths of Pennsylvania and Virginia. It is curious to note that at this time New York was reckoned among the smaller, and Massachusetts among the larger, States.

An entire summer was taken up in the discussion of the scheme, and upon the 17th of September, 1787, the convention finished its work and the Constitution was finally adopted, though sixteen of the fifty-five delegates refused to sanction it by their signatures. As was afterwards said by John Quincy Adams, it was a "compromise extorted from the grinding necessities of a reluctant people." It is related of Washington that he took no part in the debates except to suggest in a humorous way, in reply to a proposed resolution to limit the standing army to five thousand men, that foreign powers should be forbidden to invade the territory of the United States with more

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than three thousand. The Constitution, however, was heartily indorsed by him, and within the next two years was ratified by the requisite number of States to give it effect. Such, in brief, was the birth of the great nation which we call the United States of America.

To the unlearned mind it might appear that the work of founding the government was then complete; that all disputed questions had been settled, and that nothing remained but to put it in motion. Nothing could be further from the truth: the questions which had been settled were as nothing to those which remained unanswered. The skeleton of a government was there, but the flesh and blood that were to give it life were wanting. It is a matter of common knowledge to the legal profession that in every line of the plainest written instrument there lurks an unsolved problem. There was the Constitution in black and white, but how should it be construed? Liberally, to create a great and powerful nation; or strictly, to preserve the sovereignty of the States? The Congress, the people, the press, and even the Supreme Court itself, were divided upon this question. It was not until the close of the civil war that it was finally determined that the Federal Government was not a mere agent of the States, as claimed by the States Rights party, but was a single, united, homogeneous nation. It was felt from the first that the solution of all problems connected with the construction of the Constitution must rest with the Supreme Court of the United States.

As already stated, but one important question of constitutional construction came before that court during the first ten years of its existence. In the great case of Chisholm *v.* The State of Georgia it was held, with but a single dissent, that a sovereign State might be sued by

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a citizen of another State. The doctrine was certainly a startling one, as it was a canon of the common law that the king could not be sued except by his own consent. Here the conflicting theories of the Federal and States' Rights parties were first presented. Mr. Justice Wilson struck the key-note of the entire controversy by saying that the case resolved itself into the question: "Do the people of the United States form a nation?" The State of Georgia was ordered to appear and submit to the jurisdiction of the court. She replied by denouncing the penalty of death against any one who should presume to serve the process of the court within her jurisdiction. The States which were absurdly jealous of the Federal Government, and were heavily indebted at the time, fairly rose in rebellion against the decision, and it was not until a constitutional amendment had been adopted prohibiting a State from being sued by an individual that the popular agitation was quieted. The reception of its first important decision did not augur well for the success of the new court.

At this critical juncture President Adams called to the Chief Justiceship John Marshall, of Virginia, then the leading lawyer of his native State. He came of a highly respectable but not eminent family, and he himself said afterwards of his father: "My father was a far abler man than any of his sons. To him I owe the solid foundation of all my success in life." He had been long in public life when appointed, and had filled a number of places with credit to himself and honor to his country. At the outbreak of the Revolution, then a boy of nineteen, he was made a lieutenant of a company of minutemen, in a regiment of which his father was major. These were a kind of volunteer soldiery, of whom John Ran-

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dolph, of Roanoke, afterwards said in the Senate: "They were raised in a minute; armed in a minute; marched in a minute; fought in a minute, and vanquished in a minute." They were dressed in green homespun hunting shirts, with the words "Liberty or Death" in large white letters upon their bosoms. They wore buck-tails in their hats, and in their belts tomahawks and scalping knives, and their savage appearance struck terror to the inhabitants as they marched through the country. The future Chief Justice was evidently a boy in his youth. Marshall followed the volunteer standard during the gloomiest period of the war; participated in several of its battles, and spent the winter with Washington at Valley Forge. At the close of the war he returned to Richmond and to the practice of the law. He was subsequently elected to the legislature, and to the State convention which ratified the Constitution. He gave it an earnest support, and it was finally adopted by a narrow majority.

Marshall had implicit faith in the judgment and wisdom of Washington, supported the liberal but vigorous policy of his administration, and in return enjoyed his unqualified respect and esteem. Washington made him envoy extraordinary to France, and at his personal request Marshall permitted his name to be used as a Federalist candidate for Congress. Unfortunately one of his first duties was to announce the death of his friend and benefactor. It was from Washington's successor that Marshall, at the age of forty-five, received the crowning honor of his life, in his appointment to the Supreme Bench. His personal appearance at that time was thus described: "In his person, tall, meagre and emaciated; his muscles relaxed and his joints so loosely connected as not only to disqualify him apparently for any vigorous

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exertion of body, but to destroy anything like harmony in his air and movements. Indeed, in his whole appearance and demeanor: dress, attitudes, gesture; sitting, standing or walking, he is as far removed from the idealized graces of Lord Chesterfield as any other gentleman on earth. His countenance has a faithful expression of great good humor and hilarity, while his black eye, that unerring index, possessed an irradiating spirit which proclaims the imperial powers of the mind that sits enthroned within." It was said of him that "he was endued by nature with a patience that was never surpassed: patience to hear that which he already knew, that which he disapproved, that which questioned himself. When he ceased to hear it was not because his patience was exhausted, but because it had ceased to be a virtue."

He became at once the guiding intellect of that great tribunal. Of the eleven hundred and six opinions filed during his incumbency of thirty-four years (about as many as are now delivered in three years), nearly one-half were delivered by Marshall himself, but his fame rests upon less than a score of his constitutional decisions. It is as the expounder of the Constitution that his name will be known to American history. In the very first of these cases he laid down a principle, which, though not entirely novel, has done more to perpetuate this government than even the Constitution itself. That is: that courts of justice have the power to determine the validity of laws enacted by Congress, and to declare such as are passed in violation of the Constitution to be null and void. In no other country has this been attempted, and yet for the want of it more than one Constitution has been torn in shreds. It undoubtedly involves a tremendous responsibility for a court, or a single

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judge, to nullify an act of Congress; but unless there be an intermediate power between Congress and the people, there is no guaranty that the limitations of the Constitution will be observed, except the conservatism and discretion of the legislature — a very uncertain quantity in times of political excitement. In other lands, less fortunate than our own, the legislature is sole judge of the constitutionality of its own laws, and an outraged people have no recourse except to revolution. Here, the citizen appeals at once to the courts to determine whether the legislature has exceeded its powers. In but one case since the court was organized has the country refused to acquiesce in its judgment, and out of that refusal grew the civil war, which soon followed. That time, at least, it was demonstrated by the stern arbitrament of war that the people were right and the court was wrong.

In one of the earliest of the constitutional cases, which arose soon after Marshall came upon the bench, the court was obliged to overrule an attempt of the Supreme Court of Virginia to nullify an act of Congress empowering the Supreme Court of the United States to review the judgments of State courts upon Federal questions, by holding such act to be unconstitutional. Probably, because it involved an implied censure upon the Supreme Court of his native State, the opinion was not delivered by the Chief Justice, but by Justice Story. In an unanswerable argument Story demonstrated that the existence of an appellate tribunal as a final interpreter of the Constitution was necessary to the very life of the Union, to prevent a conflict between the States themselves as to the proper construction of the instrument. It is true that the Constitution did not give the Supreme Court that

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express power, but, as said by Justice Story, "it did not suit the purposes of the people, in framing this great charter of our liberties, to provide minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence." After the trial and experience of a century, we can now see that the safety of the Constitution was in its generalities. It is impossible for any body of men to foresee the contingencies of the future. It was better that the details of the government should be worked out through an intelligent Congress, than that it should be tied down by restrictions that might become intolerable. Limitations upon legislative power, which are endurable in State Constitutions with their facility of amendment, might easily have wrecked the Federal Constitution, which can only be amended by consent of three-fourths of the States. Indeed, if the Constitution ever be superseded, it will probably be by reason of its inflexibility.

The difficulty of amendment by popular or legislative action, the fact that such amendments as have been made have been carried under the stress of a strong public sentiment, and the ill success which has attended some of them, are a distinct vindication of the policy of the great Chief Justice, who never permitted himself to be hampered by precedents, even of his own making, and was always ready to adapt the Constitution to unforeseen exigencies as they arose, where it could be done without a

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violation of the express words of the instrument or a disregard of its obvious intent. The generous interpretation he gave it was often sufficient of itself to obviate the necessity of an amendment.

In the great case of McCulloch *v.* State of Maryland he held it to be within the power of Congress to charter a bank. It was conceded that no such power was expressly given, but under the authority of Congress to make all laws which shall be necessary and proper for carrying into execution the powers of the general government, he held that it had a choice of means, and that among them was the creation of corporations for national purposes. This case not only upheld the power of Congress to establish the United States Bank, whose charter was then attacked, but it lies at the foundation of our great system of national banks, which sprang up during the war, largely taking the place of State banks, whose bills were only received at a discount, and for the first time gave to the country a currency of equal value in every State.

By the Constitution States were prohibited from passing laws impairing the obligations of contracts. By its original charter from the Crown, the control of Dartmouth College was vested in a board of twelve trustees, with a power of perpetual succession by filling vacancies in their own body. By an act of its legislature the State of New Hampshire increased the trustees to twenty-one, partly appointed by the Governor of the State, and also established a separate body of twenty-five overseers, twenty-one of whom were also appointed by the Governor, with the power of supervision and control. As is usual with questionable legislation, there were some politics at the bottom of it. The case of Dartmouth College was argued

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by the most eminent lawyers in the country. In the masterly argument for his *alma mater*, Daniel Webster touched the cap-sheaf of his fame as the greatest constitutional lawyer of his age. The profession waited with breathless anxiety for the decision. The Chief Justice held that the charter was a contract, that the legislation of New Hampshire not only impaired it, but was destructive of it, and was therefore void. This is, perhaps, the most far-reaching decision that was ever pronounced by him. While it has been much criticised, and somewhat limited by subsequent cases, it has stood the test of seventy-five years, and has frequently been the means of preserving private charters from legislative spoliation. Indeed, this clause of the Constitution has given rise to such a vast amount of litigation that there is scarcely a volume of reports that does not contain from one to a dozen cases turning upon its proper construction.

In Gibbons *v.* Ogden the power of Congress under the Constitution to regulate commerce was declared to extend to the regulation of navigation, and a grant by the State of New York to Livingston and Fulton of an exclusive right to navigate for a term of years all the waters of the State with steamboats was held to be inoperative, as in conflict with the laws of Congress regulating the coasting-trade, and that the States could not restrain vessels licensed to carry on that trade under the Federal laws from entering and navigating those waters in the prosecution of such trade. This was the leading case upon the vexed question of the power of Congress over commerce, the possibilities of which are not yet fully appreciated. A different decision of Gibbons *v.* Ogden would have worked a practical destruction of this power, and placed the entire coasting-trade of the country under the control of the several States.

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But I have neither the time, nor you the patience, to attempt a review of all the opinions of this the greatest jurist who ever sat upon an American bench. Great men are ordinarily born of great crises, and while, as Pinkney said of him, Marshall was born to be Chief Justice of any country his lot might happen to be cast in, much of his fame is doubtless due to his exceptional good fortune in going upon the bench at a time when the proper construction of the new charter began to claim the attention of the court. The man and the opportunity met together. In this particular Marshall was even more fortunate than his great English compeer, Lord Mansfield, who was created Lord Chief Justice just at the time when commercial law, and particularly the law of negotiable paper, began to take definite shape in the jurisprudence of the mother country. It fell to him to adapt the common law, which had but scant respect for personal property, to the needs of modern society, as it fell to Marshall to create out of the new Constitution a practical scheme of government. Fortunately, Marshall was untrammeled by precedents. His duty was to blaze a path through an untrodden wilderness of theories and speculation. If the construction of colonial charters afforded him any light he never acknowledged it, as he rarely cited a case as authority except to answer it, and almost never quoted from an opinion. Indeed, it is refreshing to turn from one of our modern opinions, weighed down as they are by prior cases, to one of Marshall's clear-cut statements of the law, wherein, by a process of pure reasoning, he marches directly to his conclusion. In the great case of Marbury *v.* Madison he cited but one authority, an opinion of Lord Mansfield, though there were many precedents in this country for his action; and in the still greater

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cases of McCulloch *v.* Maryland and Dartmouth College *v.* Woodward, not a single one. His self-reliance was his most remarkable trait. An ordinary judge would have felt bound to analyze, criticise, or distinguish every prior case upon the same subject. Marshall evidently considered this a confession of weakness, and despised a judgment that could not stand alone. It is no disparagement to others to say that none of the subsequent opinions of that court can compare with his in lucidity of statement, breadth of argument, and directness of purpose. He believed in giving that liberal construction to the Constitution which should secure to all the States the advantages of a perpetual union; that in carrying out the intent of its framers, Congress had certain implied powers, or, as he termed it, "a choice of means" not found in the express words of the instrument itself, and that under its power to enact such laws as were necessary and proper to carry the government into effect, it was not limited to such as were absolutely indispensable. In summing up his career it will suffice to say that he found a Constitution imperfectly understood; wholly satisfactory to but few; criticised by its enemies, and distrusted by its friends. He left it, at the end of his thirty-four years of service, adored and venerated by every citizen who had grown up under its protection and had shared in its blessings.

The Chief Justice was not a learned man in the ordinary acceptation of the word. He did not carry in the store-house of his memory that stock of legal lore, that accumulated mass of precedents, which is usually considered a necessary part of the equipment of a great judge. He was not to be compared in this particular with Story, whose opinions were enriched with illustrations drawn

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from the civil as well as the common law, and were sometimes complete treatises upon the subject under discussion. Marshall's reasoning upon the other hand proceeds like a demonstration in Euclid. Starting from the fundamental principles of law, he marched directly toward what he conceived to be the logical conclusion from the premises, as applied to the particular facts. The premises might be questioned, but there was no flaw in his argument from them. Compare their two opinions in the Dartmouth College case, and you will appreciate the different characteristics of two great minds. Story, who went upon the bench at the early age of thirty-two, with a diffidence natural to a young man, preferred to lean to a certain extent upon the master minds of the law, and to fortify his own conclusions by an exhaustive citation of earlier cases. This habit once acquired continued with him through life. Marshall, whose mind was already enriched from his own experience as soldier, practitioner, legislator and diplomat, relied upon an intuitive perception of what the law must and ought to be, and what the necessities of the country demanded. He would have been great simply as a common-law judge, though not greater than Shaw, or Kent, or Story, but as an expounder of the principles which lie at the foundation of a free government he was without a rival. Indeed, he was not merely the expounder of the Constitution, but virtually the creator of that branch of legal learning known as Constitutional Law.

In his mental structure he was calm, contemplative and profound. He possessed what is termed the judicial temperament to a degree rarely equaled. In his manners he was modest, simple and unaffected; as devoid of affectation and vanity as he was of superficial elegance. He

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possessed a personal dignity which repelled familiarity, yet savored nothing of haughtiness. His equanimity was rarely disturbed or the smoothness of his temper ruffled. He was affable to his equals, condescending and gracious to his inferiors. We can imagine that he would have been deferential to his superiors, but he had none. His popularity was such that men who never voted the Federal ticket were heard to say that they were ready to support John Marshall for any office for which he chose to allow himself to be a candidate. He was neat, though careless, in his dress, and in his deportment the courtesy of the gentleman was not forgotten in the dignity of the judge.

In his moral nature he was devoid of vices. The researches of the faithful historian, which have revealed so much to smirch the reputation of many of the eminent men of that day, have found nothing in the character of Marshall which the Recording Angel might wish to blot out with a tear. "He needed not the smart of guilt to make him virtuous, nor the regret of folly to make him wise." He was an unaffected admirer of women, and was never more pleased than in speaking of their triumphs in the world of art and letters. He had a fine sense of humor, which has become hereditary upon the Supreme Bench. He boasted of the fact that he never took wine except in wet weather; but as he was as liberal in his definition of the weather as he was in his interpretation of the Constitution, if the sun shone in Washington, he used to say that the country was so large that the chances were all the greater that it must be raining somewhere within the jurisdiction of his court. The consequence was that the Chief Justice always lived in a moist climate.

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In short, to Marshall more conspicuously than to any other judge of the past century is Shirley's description of a great jurist applicable: "A man so learned, so full of equity, so noble, so notable in the progress of his life, so innocent, in the manage of his office so incorrupt, in the passages of State so wise, in affection to his country so religious, in all his services to the king so fortunate and exploring, as envy itself cannot accuse, or malice vitiate, whom all lips will open to commend . . . and in their hearts will erect altars and statues, columns and obelisks, pillars and pyramids, to the perpetuity of his name and memory."

The Supreme Court was as fortunate in its bar as it was in its Chief Justice. Indeed, the judicial life of Marshall may be said to be coincident with the golden age of American oratory. The clear voice and fervid eloquence of Patrick Henry had indeed been hushed in death, but he left behind him a generation of advocates who excelled him in the solid qualities which go to make up the great lawyer. Rufus Choate, who is said to have made his choice of the profession after reading the arguments in the Dartmouth College case, while in college, and whose impetuous eloquence recalled the triumphs of Patrick Henry, had not yet come upon the stage. At the head of the bar was Edmund Randolph of Virginia, the first Attorney-General of the United States, whose fearless prosecution of the Chisholm case against the State of Georgia extorted even the admiration of his enemies; William Pinkney, the most eminent lawyer of his generation, who united profundity of thought and brilliancy of expression to an unequaled extent; William Wirt, the most persuasive orator at the bar, who argued against his native State the power of Congress to incorporate a bank;

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Walter Jones, pronounced by Marshall to be the finest constitutional lawyer who ever argued a case before him; Daniel Webster, then in the fullness of his intellectual vigor, pleading in a voice choked with emotion for the life of his *alma mater*, and later defending the Christian religion against an alleged stigma cast upon it in the will of Stephen Girard; Dexter of Massachusetts; Hoffman, Ogden and Emmet of New York; Ingersoll, Sergeant and Binney of Pennsylvania, and a score of others scarcely less notable, were the legal luminaries of that generation.

Accepted as Marshall's views of the Constitution now generally are, it must not be supposed that they received the unanimous approval of the court. The strict constructionist or States' Rights party was always represented, and ably represented, upon the Supreme Bench; but it was not until after the death of Chief Justice Marshall that theirs threatened to become the dominant sentiment of the court. Their principal champion was Mr. Justice Daniel of Virginia, a man of great learning, sturdy independence and strict integrity, who devoted a long judicial life of nineteen years largely to the writing of dissenting opinions in constitutional cases. In his view the Constitution was a mere compact or agreement between the States, of which the Federal Government was simply the agent. All the powers of government belonged to the States, except such as were delegated in so many words to Congress. Notwithstanding the power expressly given it to provide for the general welfare of the country, it had, in the opinion of this party, no power to incorporate a bank for the relief of the Treasury, to build a highway for the carriage of the mails, to improve rivers and harbors for the benefit of commerce, to prohibit the States

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from taxing the functions of the Federal Government, or even to exclude slavery from the national domain.

There was something to be said, however, in extenuation of these views now so thoroughly exploded. For fifty years after the Constitution was adopted, the several States were practically isolated communities, living among themselves, without railways, steamboats or telegraphs, and with little intercommunication of any sort. Each had its own laws, customs and systems of labor. All were most absurdly resentful of outside influence. To the traveler, Richmond was then farther from Washington than Boston is now, and in the matter of news, the Baltimore of the first half of the century was more inaccessible than the San Francisco of the later half. It can scarcely be wondered at that each capital became the center of an intense provincial sentiment. Inheriting these influences from their surroundings, the leaders of the States' Rights party had not the foresight to anticipate the immense development of the future, nor the breadth of intellect to appreciate the political changes which the growth of the country must inevitably bring about. There is no reason to doubt their patriotism, their integrity or their good faith; nor their attachment to the Constitution as they understood it. Their fundamental difference with their brethren (their fundamental error we should now call it) lay in their construction of the Constitution. To them it was simply a new charter of the old Confederacy. The United States were not a nation, but an "agent." The Constitution itself was nothing more than an enumeration of general, abstract rules, adopted by the several States for the guidance and control of their creature — the Federal Government,— which they were about to call into being for their exclusive benefit. Apart from

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these rules, the Federal Government had no functions and no existence.

Happily their views did not prevail. It has been said that dissenting opinions are apt to be correct, and ultimately to obtain the approval of the court. It has not been so in this case. None of the principles they combated so vigorously have ever been unsettled,—none of their own doctrines have ever become incorporated in the law of the land. Had the issue between them and their brethren resulted as they desired, we should have been living under a different flag, or under a remnant of the old one. Possibly this would have been a better country; certainly it would have been a very different one.

Their prophecies of evil have not been fulfilled. The Federal Government has indeed grown stronger, slavery has been abolished, vast sums have been expended upon internal improvements, and our interior waters are alive with an immense commerce made possible only by Federal appropriations. The inability of the States to tax or interfere with this commerce has been repeatedly affirmed. But in all this their sovereignty has not been essentially impaired. We can now see that a strong central government located at Washington, and made up of delegates from the several States and the people thereof, is a very different thing from an imperial government three thousand miles over the sea, in which the colonies were not represented at all. A great power has indeed arisen upon the banks of the Potomac, but it contains no threat of an invasion of the authority of the States. The Constitution has survived the shock of a great war, the rights of the citizens have never been more carefully protected, the line between State and Federal power has never been more accurately drawn.

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The burden of establishing this line of demarcation has fallen almost exclusively upon the Supreme Court, and principally upon the successors of Marshall and their contemporaries. It has not been done without a stout resistance from the courts of some of the States, nor without the earnest remonstrance of many able men whose loyalty to their native States could not brook the thought that their own courts should not be as supreme in the interpretation of the Federal Constitution as the Constitution of their own States. Complaints of that kind have not ceased to be heard. The court itself has by no means been unanimous as to some of these questions, but the general acquiescence of the country in its decisions is one of the most hopeful features of our public life, and the best guaranty of the perpetuity of republican institutions.

It is not probable the country will produce another Marshall. The opportunity which came to him will never be repeated. The law, so barren of authorities at that time, has become a mass of precedents, and the efforts of a judge are limited to applying them to the particular cases. Under these conditions, great originality is impossible. A library of a thousand volumes in the time of Marshall was comparatively as large as one of thirty thousand to-day. It is true that great cases are still constantly arising; but ingenuity is exhausted, not in searching for great principles of law, but in analyzing and distinguishing prior cases.

It is possible that the present century will produce problems of its own, which will tax to the utmost the resources of statesmanship, but they are likely to be social rather than legal. Whatever government shall succeed this one, and we can scarcely dare to hope, with the con-

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stant changes in political sentiment which are going on, that the Constitution will remain unaltered, we may safely assume that the same fundamental principles will underlie them, and that the opinions of the great Chief Justice will be looked to for centuries to come as expressive of the soundest views of a federated government. There are undoubtedly disturbing elements in our present social system, which are calculated to excite the apprehensions of patriotic men. The conflict between capital and labor, which is as old as the exodus of the Israelites, who went off on a strike because the Egyptians refused to furnish them straw for their brick, is something which will not down, and which legislation is apparently powerless to remedy. So far as it involves a question of wages, arbitration may do much to mitigate its evils; so far as it involves the employer's control of his own business, the men whom he shall employ and the customers to whom he shall sell, the settlement seems farther off than ever.

The whole theory of production and distribution has been revolutionized within the past forty years, and modern society must perforce adapt itself to new conditions. The necessaries of life are gradually being absorbed by combinations of capital, and the time is not far distant when everything we drink, eat and wear may have to be purchased through the agency of a single corporation controlling the product. Combinations have already destroyed individual enterprise in the most important branches of trade, and the small producer has gone to the wall. I believe I voice the almost universal sentiment of the country in saying that there is no prejudice against property, nor against wealth, honestly acquired. The whole theory of our civilization is built upon the sanctity of private property and the natural

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right of man, by superior ability, industry and skill, to rise above his fellows. It is the men of wealth who set the wheels of commerce in motion, give employment to thousands of willing hands, create a market for the refinements and luxuries of life, found our universities, build our churches, fill our galleries with works of art, and give to life its zest, and to labor its appropriate reward. Indeed, the Federal Constitution itself is so jealous of the rights of the individual that it declares that no State shall impair the obligation of contracts. But the right of acquisition is not unlimited. It must be exercised within the law and in obedience to statute. It puts a premium upon fair competition and individual enterprise, but it denounces the illegal use of wealth in corrupting legislation and obtaining unjust exemptions from taxation; it stamps with illegality all contracts in restraint of trade, combinations to fix prices, to crush out rival dealers by threats and oppression, the wrecking of great corporations in the interest of directors, and every scheme the object of which is to monopolize a single product of manufacture.

That society will ever be re-established upon the old basis of small dealers, small manufacturers, and small producers is as impossible as the return of the hand-loom and the spinning-wheel. The steam engine has disposed of the latter forever. The railroad and telegraph are rapidly driving the other from our national life. We may lament the disappearance of the small trader, whose entire stock of goods was contained in a single room or, perhaps, even in a window; but the Bon Marchès, the Macys and the Wanamakers of commerce have taken his place, and he has become a salesman in

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their employ. A restoration of the old order of things is impossible. Society must adapt itself to its new conditions, and do its best to minimize the evils of the situation. It is, after all, more a change of form than of substance. The profits which formerly went into the pockets of the small producer are now even more widely distributed in the shape of dividends to stockholders,—little rivulets of wealth which trickle through all classes of society, and offer the rewards of thrift to the humblest households of the land. If the head of a great corporation takes to himself an apparently disproportionate share of the profits, it is only in obedience to an universal law that the man who develops extraordinary capacity in any direction receives an extraordinary reward. Legislation may do something to stem the tide of consolidation, but it can scarcely do more than localize the business of the great capitalist. If, by combinations with other great operators, he is able to monopolize the product of the whole country in a particular article, he becomes a national menace, and a weapon for the socialist agitator.

The tendency of which I have spoken with respect to commerce and product is equally manifest with respect to population, which is undergoing a process of shifting from small towns to large cities. The influence of railways is to deplete the villages and to build up cities. It is for their interest to carry freights as far as possible, to favor their terminal stations and the great manufacturer at the expense of the small one. The village becomes more and more dependent upon the city. Unless it possesses peculiar advantages for manufacture, a great university or other public institution, or attractions as a summer resort, its young men desert it, its population

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diminishes, its land falls in value, its life stagnates. It feels that it has been unjustly dealt with and robbed of its natural growth by railroads which it had, perhaps, contributed to build, and it seeks for legislation to relieve from that for which legislation is powerless.

These are the problems, rather than those of Federal and State rights, which bid fair to engage the attention of coming generations. The men who will be called upon to grapple with them will not be the judges and lawyers of the twentieth century, but rather its statesmen and philosophers. Great men will doubtless rise and take their places in public life, but they will be men of the stamp of Franklin and Hamilton, rather than of Marshall, who will probably remain for ages to come an unique figure in American history. The struggle will be fought out with a persistency born of hunger, if not of desperation; will be accompanied perhaps by bloodshed and tears, but I have the utmost confidence that in the end, and after many trials and much tribulation, the strong sense of the Anglo-Saxon will assert its supremacy and society will readjust itself upon a basis of justice and equity to all men.

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STATE OF NORTH CAROLINA.

Marshall Day was appropriately celebrated at the University of North Carolina — Chapel Hill — by a convocation of the faculty and student body, with members of the bar and citizens of the town, in Gerrard Hall, which was filled to overflowing.

President Francis P. Venable presided over the meeting, and introduced Judge James C. MacRae, the Dean of the Law School, who spoke as follows:

Address of James C. MacRae.

My father told me that he remembered to have seen ride up to the old hostelry known as Cooke's Tavern, in Raleigh, many years ago, just before the opening of a term of the Federal court, a tall old gentleman, who, like the stick-gig in which he was riding, was rather travel-stained. He was plainly, not to say carelessly, dressed; his manner was genial, his address kindly and his greeting pleasant, and there was utterly lacking in him that unconscious self-assumption which one may well expect to see as the mark of a man in authority. He might have been taken for the ordinary country gentleman coming to town, or perhaps for the old-fashioned lawyer on his circuit. This was John Marshall, the Chief Justice of the United States, the head of its judicial system, a system which, we shall see, differs from all others except those which since have been modeled upon it; and he was the highest officer of any court in the world.

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Federalist though he was, he bore himself with pure republican simplicity in those early days in the life of the republic — so early that its officers had not yet learned to divest themselves of the pomps of sovereignty. It was soon after he became Chief Justice that Mr. Jefferson, who represented another school of politics, is said to have quietly ridden to the capitol, hitched his horse, and walked to the place where he took the oath and assumed the Presidency. Many traditions have come down to us of the simple, almost homely, private life and character of this great man who moulded the Constitution to his views, and did more than any man to fix the status of the general government in relation to its parts. Neglect him not, young men, who find your high exemplars along the lines of all the great and good, when you come to learn the lesson that the grace of greatness is simplicity and truth.

The Constitution of the United States, framed with so much of deliberation, made necessary by the failure of the Articles of Confederation to serve the purpose of a government which had passed from the struggle for freedom into the accomplishment of peace — this Constitution was not a scheme worked out of the imaginations of its founders. Some of you may remember "the fundamental Constitutions of Carolina," written for the province of North Carolina by John Locke, the philosopher, and what a failure it was; but *this* Constitution was an evolution; it was the aftermath of an experiment with the first fruits of independent statehood, the result of a far-seeing judgment based upon the experience of the workings of all free governments which had gone before in the ages.

There was the thousand-year growth of the unwritten

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Constitution of England, through which the spirit of liberty had struggled, maintaining itself over the heads of kings. There were the experiments and failures of the earlier republics in the East. There was the great system of the universe, the central sun, the revolving constellations, in their perpetual order. There were the unfailing principles of natural justice and personal liberty bought with a price and never to be yielded. There were the rights of sovereign, independent States, supposed to be retained; the portions of sovereignty granted, the checks and balances to hold in place, to make of many one, and yet to keep each in its sphere. Unlike ordinary laws which might be changed according to necessity or expediency by each succeeding legislature, it was the framing of a fundamental charter, not to be altered except upon consideration and by the States who made it. This work then had been done; the Constitution had been adopted and ratified; the machinery of government under it had been set in motion; the never-to-be-finished task of applying its principles to the facts of new and ever-arising questions had been begun.

In the eleven years which had preceded the appointment of John Marshall to be Chief Justice, but few great principles had been settled. The eminent jurists and publicists who had essayed the task had well nigh given it up. The office of Chief Justice had four times become vacant, and, while filled, its occupants had held other positions of honor and responsibility under the government. The first Chief Justice, John Jay, had, during his term of six years, spent fourteen months as envoy to England, and, without returning to his seat upon the bench, resigned to become Governor of New York. John Rutledge, of South Carolina, had been appointed, and had

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held the office from July, 1795, until the end of the next session of the Senate, his nomination not having been confirmed. William Cushing, of Massachusetts, had been appointed and had declined, and Oliver Ellsworth, who succeeded Rutledge in March, 1796, had spent a year or more abroad as envoy to France, and then resigned to return to private life, and when it was again offered to the former Chief Justice Jay his despairing declination was in these words: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which was essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and expediency of my returning to the bench under the present system."

It was a time when party spirit ran as high as we have ever seen it run in our day. Intense bitterness prevailed. The Constitution had been ratified by the States after, in some instances, protracted discussions; and after its ratification the two parties continued to assert their views with equal ardor upon its construction. John Marshall had been foremost in Virginia in advocating its ratification and in favoring that construction which would make of the Union a strong, consolidated empire. He stood at the head of the Federal party in Virginia; he had been its strongest expounder in the Legislature and in Congress; he was a great politician, using the word politician in its best sense, as well as a great lawyer, and he was Secretary of State under the elder Adams, who, in the closing year of his term, was seeking to strengthen the Federal theory of the Constitution before Jefferson, who was and is and ever will be as long as there is a principle

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to contend for, the incarnation of the very opposite ideas of construction, those of the then Republican party — State sovereignty and strict construction.

And so it was that on this day, the 4th of February, 1801, just a century ago, at the first meeting of the Supreme Court of the United States in Washington, John Marshall, of Virginia, took his seat, the seat from which, for the term of a full generation of living men, he was to write almost every opinion of great importance as Chief Justice of the United States. And now, as we stand upon the high ground of the new century and look back over the growth and development of the Constitution in its relation to the strength of this government, it is in the mouths of all men to say that the foundations of its power were laid by him.

But I hope you understand that in tracing the character of this great man and his influence upon the construction of the Constitution, one may not be required to subscribe to the political tenets which in certain particulars guided that construction. Bred in a different school of politics, those of us who look to Monticello for the springs of faith may strenuously dissent from the strengthening and consolidating ideas of the Federalists, and the inevitable weakening and final destruction of the sovereignties of the separate States under a construction which, however embedded now into the jurisprudence of this country, was as bitterly fought as it was fiercely upheld by those who, side by side, had achieved the independence of the colonies. Surely, however, we may admire the intellect, the wisdom, the will, and may we not say the honesty of intention and purity of purpose, of those who worked out such a different conception of the effect which was to be given to the compact embodied in

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this fundamental agreement between the States which formed the Federal Government. In this place of free discussion, where the young men and women are led to reason out their own opinions and express their own convictions, we may admire the spirit which inspired, and yet fail in enthusiasm over the results of the inspiration.

It required more than the culture of a trained lawyer, with his huge bundle of precedents, to interpret the Constitution.

The country then, as now, and as it always will be as long as there is love of liberty and boldness of speech, and that proper unrest which looks for betterment, was divided into parties. The debates in the conventions upon the formation of the instrument, and of those States which hesitated at its ratification, were conducted with great ability. The discussions on the hustings were not without rancor. And later, out of the intense acerbity attending upon the change of administration from Adams to Jefferson, no wonder that harsh expressions were used on the one side and on the other concerning the leaders in those political struggles. Jefferson, with Henry and Mason, led in Virginia, and did not hesitate to characterize Marshall's arguments, and afterwards his judicial opinions, as crafty sophistries, ruinous to the public and republican institutions.

How well we know that, although the Constitution was adopted and ratified and at once amended to emphasize the sovereignty of the State and the personal rights of the citizens, still the opposing parties held to their opinions, and for seventy years, with varying fortunes, the discussions went on through two generations of men and statesmen. The conflict was irreconcilable; compromises were made and broken, decisions were re-

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vised and tempered, until at last the settlement of the Constitution was submitted to the *ultima ratione* and was only accomplished, in the usual way, through blood and sacrifice.

It has seemed to me that this latter-day fear of imperialism on the part of some political leaders, on both sides, is but an awakening to the fact that the republic which many of its founders thought they had established never had a political existence, and, if not in the beginning, at least thirty-five years ago, gave place to a splendid imperialism which went forth conquering and to conquer until, in the fullness of time, its mission shall be accomplished. Our patron saint, Sir William Blackstone, whose system of commentaries on the law of England has never been surpassed, and who saw nothing in the absurdest custom of the common law but the perfection of reason, and to whom every judge was a "living oracle," gravely said that what is called the conquest of England by William the Norman, and which, by the way, was the completest conquest that ever befell an unwilling people, was in truth but an acquisition. But the story of conquest is the story of the race. Call it acquisition, call it purchase, the mailed hand of power always signs the articles. Conquest is no far-away dream of islands in the Pacific, the Caribbean and the Southern seas. Its surging tide has not long since swept over this land in which we dwell, and with Harold and Hastings are Lee and Appomattox. There were eleven sovereign States confederated into a young republic, overborne, conquered, blotted out forever. There was a beautiful white banner with its emblazoned cross, begrimed in the smoke of battle, furled in the halls of history. And the solitary soldier of the dead Confederacy stands at the western

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gate of our Capitol, looking down the road along which the last of his comrades marched — into oblivion. No morning rays shall ever awake him again to glory. There he stands, and will stand forever, with steadfast gaze upon the setting sun. But he stands there to tell the silent story of the past, and to testify to the generations that the struggle for autonomy and constitutional freedom, though it brought only disaster and defeat, was the last appeal to the God of Battles for a different construction of the Constitution.

The splendid opinions of Marshall by which he worked into the warp and woof of the Constitution the theory of Federal power were no more than was expected of him. He was a Federalist upon principle from the beginning. When, in Congress, he announced the death of Washington, he spoke of him as the founder of this "*widespreading empire.*" He was not long, after assuming the Chief Justiceship, in declaring from the Bench, in the case of Fletcher *v.* Peck, 6 Cranch, 87: "But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution; she is a part of a *large empire;* she is a member of the American Union." And again, in Cohens *v.* Virginia: "These States are constituent parts of the United States. They are members of one *great empire* — for some purposes sovereign, for some purposes subordinate."

May I call your attention to a very few cases, out of many, to illustrate the leaning of the court to the doctrine of strength in the Nation as opposed to the other doctrine of sovereignty in the States; and to show, by

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the way, that there has always been some conflict between the courts and the other branches of the government, and that as against the people the courts have not always prevailed ?

In those eleven years of the life of the Supreme Court before the accession of Marshall the court was mostly engaged in organization and in settlement of the practice, and of property rights arising out of the confiscation acts and the subsequent treaty of peace between the United States and Great Britain. But one overshadowing matter attracted the attention of the court, and this was that under the Constitution a citizen of one State had the right to sue another State. The question was presented in several different forms, but in the well-known case of Chisholm *v.* Georgia, where the State of Georgia refused to answer, it was squarely determined in the affirmative, Chief Justice Jay delivering the opinion and our Justice Iredell vigorously dissenting. But this construction, so vitally affecting the sovereignty of the States, met with an instant response from Congress and the States by the adoption of the eleventh amendment, and in February, 1798, in Hollingsworth *v.* Virginia, the court held that the amendment being adopted, there could not be exercised any jurisdiction in any case, past or future, in which a State was sued by the citizen of another State or by citizens or subjects of any foreign State. So, in the first conflict, the States won, and their sovereignty was vindicated for the time.

I may have time to tell you how this foundation principle has been reasoned and frittered away; and, while the State itself may not be sued without its consent, the officer representing the State may be compelled to do or enjoined from doing that which he may only do by virtue

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of his office. "Whosoever shall swear by the altar, it is nothing; but whosoever sweareth by the gift that is upon it, he is guilty." We have become accustomed, especially since the development of the fourteenth amendment, to the long arm of equity jurisdiction reaching from the inferior Federal judiciary to the highest officers of the State, to stay the operation of State laws upon the citizens and creatures of the State. So this contest was settled in favor of the courts.

There was another great principle incidentally announced by the earlier court in Calder *v.* Bull, that the courts may declare an act of Congress to be in conflict with the Constitution of the United States, and therefore void. This was a new principle; it could not possibly arise under the English Constitution, where the Parliament — the King, Lords and Commons — is the supreme power of the State. It had already been announced as to State courts and State laws and State constitutions in North Carolina and Rhode Island, and it had met with violent opposition from some who held that each department, being co-ordinate and supreme in its own order, neither can control the other; but in reason and logic there seemed to be no escape from it. The Constitution was the fundamental law which could not be changed but in the manner prescribed by its makers. The acts passed by the legislature were required to be in subordination to the Constitution. The courts were sworn to administer the law. In a conflict between the Constitution and the ordinary legislative act the judges must decide what is the law, and to this end must uphold, of necessity, the Constitution. But Jefferson thought that in a conflict between two co-ordinate branches of the government

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there should be a reference to the makers of the Constitution to establish its meaning.

The principle was announced with the utmost clearness and precision by Chief Justice Marshall in the great case of Marbury *v.* Madison, in 1803 — a case as familiar to the lawyers of to-day as to those at the time it was heard. Madison was then Secretary of State under President Jefferson, who was disposed to withhold some commissions to public officers which had been signed by President Adams at the last hour and sent to Marshall, the Secretary of State, by whom the great seal was attached, and left on the table for delivery. Application was made by Marbury, who had been appointed a justice of the peace for the District of Columbia, to the Supreme Court for a writ of *mandamus* to compel Madison to deliver the commission. The court, through Chief Justice Marshall, denying itself the jurisdiction to issue the writ of *mandamus*, declared that an act of Congress repugnant to the Constitution cannot become a law. It further declared that the President having signed the commission of a justice of the peace and sent it to the Secretary of State, and the same having been sealed and recorded, it could not be revoked by that President nor by his successor, although it had never been delivered. Jefferson thought that a contract was never completed until it was delivered.

There is something strangely familiar to us of North Carolina in these days in this doctrine of property in a public office when the same is not held at the will of the appointing power. An interesting episode in the history of those times is that of "The Midnight Judges." Congress had passed an act establishing twenty-one Federal Circuit Courts, and President Adams, in the very last hours of his term, had appointed sixteen new judges to preside

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over these courts. The commissions were said to have been delivered on the night before the inauguration of Jefferson, and delivered by Marshall, who was Acting Secretary of State, as well as Chief Justice, and it was supposed that a full Federal judiciary, in every sense of the word Federal, was provided for the supervision and restraint of the other branches of the government. But how easily sometimes are the effects of far-reaching decisions completely neutralized! Or, as one of our poets has said —

> "The best laid schemes o' mice and men
> Gang aft agley."

While the principle was fully established as to the property in an office, it was at once made manifest that the Congress might meet this principle and dissipate it by abolishing the office, which it immediately proceeded to do, and the midnight judges never took their seats.

The doctrine of property in office is upheld in North Carolina by the great case of Hoke *v.* Henderson and many others of later date too numerous to mention, and has recently been invoked in the dissenting opinions in Taylor *v.* Beckham, the Kentucky Governor's case, in the Supreme Court of the United States.

In another great and leading case, Fletcher *v.* Peck (1810), it was held that the United States courts may declare an act of the legislature of one of the States unconstitutional, as a bill of attainder, an *ex post facto* law, or law impairing the obligation of contracts. No wonder, again, that in those formative days, when parties were so divided upon the questions of strength of the Union, the construction of the Constitution, the sovereignty of the States, when the generation which adopted the Constitu-

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tion was still alive, that a shock was felt at such language as the Chief Justice used in regard to the large empire. "It is a far cry" back to Fletcher *v.* Peck, but it seems to me, again, a little strange that this revived fear of imperialism has of late so disturbed us, and the spirit of Lincoln has been so invoked to avert its horrors, when this expression has so long stood in the early and orthodox exposition of the Constitution, and when, after the physical impact had become imminent, Lincoln's proclamation of 1861, calling upon the States for their quotas of troops to compel the seceded States to remain in the Union, was the war-cry which swept out the border States and heralded the destruction of the relics of State sovereignty.

McCulloch *v.* Maryland was one of the most important and far-reaching decisions in the settlement of the Constitution, meeting with determined resistance, fixing the principle that it is constitutional and lawful for the United States to establish a bank as an agency of the government and that no State may tax it. This right to establish a national bank was upheld by Hamilton and antagonized by Jefferson; its discussion was not confined to the courts, and the decision of this case by no means brought peace. The removal of the deposits by direction of President Jackson, and the repeal of the charter, afford in themselves material for a lecture or a chapter in the history of this government. Yet who now will doubt the power of Congress to establish a bank?

The great case of Dartmouth College *v.* Woodward, calling forth the most effective eloquence and pathos of Daniel Webster, settled the principle that the charter of

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a private corporation is a contract between the State and the corporation which the State may not alter or repeal — a doctrine unknown in English law, and here for the first time announced, and, if we may believe the tradition of those days, to the surprise even of him who urged it, but who really hoped for final success on other and stronger grounds. I refer you to Henry Cabot Lodge's sketch of Daniel Webster in the Statesmen series, which series, I am glad to see, is popular among the students, for a most interesting chapter on this case; indeed, volumes have been written and printed about it, and it has been criticised, doubted and affirmed by this same court and many other courts an hundred times, and still men are not convinced. It might be said of some of us who have never entirely surrendered, in the quaint words of Sir Edward Coke, in the Caudrey case: "For miserable is his case, and worthy of pity, that hath been persuaded before he was instructed, and now will refuse to be instructed because he will not be persuaded." It is interesting to know that in this case also, while the principle has stood, it has been shorn of its strength by the simple writing into the Constitutions of the States or into the charters of incorporation the provision that private charters are to be hereafter subject to amendment, alteration or repeal.

You, gentlemen of the law school, will remember that the force and effect of the celebrated Statute of Uses, 27 Henry VIII, was entirely changed by the insertion of three additional words in a deed, as a consequence of which addition the influence of the Courts of Chancery revived and expanded until now, under the Judicature Act of 1873 in England and the codes of procedure and

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constitutional provisions in many States, its jurisdiction, like Aaron's rod, has swallowed up all the others.

Among the powers granted to Congress in the first article of the Constitution (see sec. 3) is that "to regulate commerce with foreign nations and among the several States and with the Indian tribes." The grant of power, especially that portion which is called "the interstate commerce clause," has called for much construction. New, varying and perplexing questions continue to arise; but, however expanded is the doctrine now, it is all based upon the opinion delivered by Chief Justice Marshall in Gibbons *v.* Ogden (in 1824).

The question involved was whether the State of New York could grant to Robert Fulton and his assigns the exclusive right to navigate all the streams of that State with vessels propelled by steam. We simply smile at the idea now; but one of the most elaborate discussions was had over it between Webster and Wirt on the one side and Emmet and Oakley on the other. In writing about it to a friend, Wirt characterized Oakley as one of the first logicians of the day — "as much a Phocion as Emmet is a Themistocles; and Webster is as ambitious as Caesar." It is unnecessary for me to tell you of William Wirt. The great and extended opinion of the Chief Justice construed the powers of Congress to regulate commerce among the States. There were no other lines then of commercial communication than the rivers and lakes; the Erie canal had not been completed, and the wagon roads — which were developments of the Indian trails — even these public roads were to some extent in the power of Congress by virtue of another section of this same article to establish post roads. There is nothing procrustean about a written constitution. Establish the first

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principles as Marshall did, and the office of his successors has been to apply them to wagon roads, turnpikes, highways and canals, railways, steam and electric, telegraphs and telephones, and all agencies of trade and communications which extended from one State into another, until now the traveling drummer from another State can ply his vocation without fear of license tax from county, town or State; and the original package of spirituous liquors or cigarettes may hurl itself through prohibition and dispensary laws without being broken.

And soon after, in Brown *v.* Maryland (1827), its powers were delineated in regard to foreign commerce and the inhibition upon the States from laying duties upon imports. Here we recognize the mother of the brood of decisions later made concerning the original package. The Supreme Court, at the present term, has gravely announced that a basket of loose packages of cigarettes, and not each separate pack, is the "original package."

Under the powers surrendered by the States to the General Government by section 10 of article I was the right to emit bills of credit; and the State of Missouri passed an act establishing loan offices and authorizing the issue of certificates of stock, receivable in payment of taxes and debts due the State. The Chief Justice delivered the opinion of the court, in which it was held that this was unconstitutional, as in reality authorizing the issue of bills of credit. A few years afterwards his successor, Chief Justice Taney, his equal in all the beautiful virtues of private life, in knowledge of the law, in facility of expression, but reared in a different school, a strict constructionist of Federal powers, held that a State might incorporate a bank and own all the stock, and its issue

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of bank bills was not in violation of this provision of the Constitution. (Briscoe *v.* Bank, 11 Pet. 257.)

After serving upon that bench and dominating its opinions for more than a quarter of a century, Marshall wrote his first dissenting opinion in Ogden *v.* Saunders (in 1827), as to the effect of an insolvent law made after the contract, and which I shall not have time to explain. Meantime the natural changes which had been wrought in the complexion of the Supreme Court began to be made manifest; and, though he remained a long time in his full vigor of mind and body, he had passed the zenith of his powers.

When Marshall first took his place he found a majority of his associates holding different views from him upon the character of the powers granted to the Federal Government, as he had found a majority against him in the Virginia Convention upon the question of the ratification of the Constitution, and as he had found in the House of Representatives on the delivery up of Jonathan Robbins to the British government, by whose authority he was promptly hanged. But he seems always to have convinced or silenced or overborne his opponents. In all the lives and sketches of him the story is told of the excited state of public feeling against the President for the giving up of Robbins, of the debate in the House, of the appearance and argument of Marshall, of Gallatin, who was to reply to him, putting down his notes and giving up the task, admitting that the argument was unanswerable. It seems to have been the strength of his logic, the perfection of his reasoning, the cogency of his expression, which brought conviction or confusion to his adversaries.

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In one month after he took his seat as Chief Justice, Jefferson succeeded to the Presidency, and on all these vital questions they were at daggers' points.

The August term of the Supreme Court was abolished, it was said, to put off an early decision in the case of Marbury *v.* Madison. You will see that it was not made until 1803, and you will also see that the elaborate opinion in favor of Marbury was what is called an *obiter dictum*, because the court admitted that it had no original jurisdiction to enforce it.

It was not long before he had an opportunity to hold the commander of a ship-of-war answerable in damages to a person injured by him in obedience to the command of the President, in relation to which these pleasantries were indulged in on either side. The Chief Justice, in his opinion, sententiously remarked: "Instructions" (referring to the President's orders as Commander-in-Chief) "not warranted by law cannot legalize a trespass."

Selecting one or two of the milder expressions of Jefferson concerning the Chief Justice and his court, "The great object of my fear is Federal judiciary. That body, like gravity, ever acting with noiseless foot and unalarming advance, gaining ground step by step, and, holding what it gains, is engulfing insidiously the special governments into the jaws of that which feeds them." If you wish to pursue this subject, let me refer you to the last number of The American Law Review, for January and February, 1901, for Jefferson's opinions of Marshall and his court, which only came to me on Saturday night.

Let me recall to you one other instance of conflict between the executive and the judiciary.

The State of Georgia claimed jurisdiction over the

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Cherokee Indians and the territory occupied by them in that State, and the State had the sympathy of that old Indian fighter, President Jackson. Under the statute of Georgia, one Worcester, a missionary, had been convicted of preaching to the Indians, and had been imprisoned. The Supreme Court held the act unconstitutional, the Cherokee nation a distinct community, under the protection of the United States, and not subject to the laws of Georgia. But, like Marbury *v.* Madison, this was a case in which the Supreme Court had no original jurisdiction to issue an injunction, and, according to Mr. Jefferson, was only sitting as a moot court when it made its decision. "The State of Georgia," says Carson (*History of the Supreme Court*), "treated this decision with defiance; the missionary was still imprisoned in the penitentiary, doomed to hard labor, the Governor declaring he would rather hang him than liberate him under the mandate of the Supreme Court." The Federal Government gave no hope of interfering in the controversy. On the contrary Jackson is reported to have said: "John Marshall has made the decision; now let him execute it." And the Georgia authorities kept him until "cooling-time" came, in about a year and a half, and then let him go where he would.

But I only undertook to tell you of Marshall's influence upon the construction of the Constitution as to the strength of the Federal Government. In the years when he was gathering strength in the hill country of Virginia, the son of a country gentleman and a Virginian matron of gentle blood; attending the country schools or studying under a private tutor, or with his father reading the old books of a well-selected library, taking up the study of the law

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at eighteen, and, like many another boy in the time yet to come, laying it aside to put on his armor and fight for independence; enduring hardship, by flood and field; growing in wisdom, distinguished as a soldier, taking *a one year's course* of law at William and Mary's; coming to the bar and speedily to the front; in the legislature, the constitutional convention, as a member of Congress, a skilled diplomat, a member of the cabinet, Secretary of State. This was the preparation which brought him to the Chief Justiceship at forty-five; and this training it was that enabled him in the succeeding thirty-four years to put such an imprint upon the Constitution, and so weld it and bind it around the Union of the States and the powers of the Federal Government that when the supreme test came it was found that his work had been perfected, and that this Union of States is one "large empire."

And why not one? It is bound together more securely than the States of the German Empire. They have no Supreme Court like ours, and their system of local self-government is stronger than ours. And the same may be said of the British Empire. But this Constitution of ours, while it binds us together in an indestructible union of indestructible States, as was said by Chief Justice Chase in the case of Texas *v.* White, gathering up the decisions of Marshall and their re-enforcement by the thirteenth amendment; yet, under those same teachings, all the powers remain to the States of local government in each department so long as the same is not brought in conflict with the so-called granted powers belonging to the Federal head.

It is upon these opinions of Marshall that all the granted powers are liberally construed. No great question such as those at this time before the Supreme Court (in the

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Insular Cases) is ever determined without liberal quotations from the opinions of Marshall, and all conclusions as to powers and sovereignties and Federal strength are founded upon them. There may not be anything so frightful in the idea of such imperialism. The Constitution is what it is construed to be, as long as the people submit to the construction. There might be some point where it should be incumbent upon one people in the course of human events to dissolve the political ties which bind it to another; but with us the causes of physical division have passed away, the power and glory of this nation now depends upon its unity; its expansion by acquisition, by purchase or by consent, has steadily proceeded until now. The argument of unconstitutionality has been worn threadbare, but still goes on. It is now a question of honor and justice and right and humanity. How far shall it go? Shall other aspirations, after freedom from foreign bondage, be swallowed up in our freedom? Shall the blessings of liberty and free institutions be forced upon unwilling peoples? Shall bruised reeds be broken and smoking flax be quenched in the name of humanity and freedom and civilization? These constitutional questions now before the courts are not as to the power but as to the effect of conquest and expansion. When does the newly-acquired territory become a part of the United States? May it be, as we were in the times of reconstruction, a part of the government for some purposes and a conquered province for others? These questions are now in the bosoms of "the living oracles," the Justices of the Supreme Court.

I hope it is not necessary for me to say that in trying to point out to you the influence of this great judge in fixing in the minds of a majority of the people these prin-

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ciples of consolidated sovereignty, I am making no complaints or strictures, and not at this late day expressing a regret — not even "warming the thin hands of age over the smouldering embers of the past." I am simply a philosopher, looking at causes and speculating upon effects.

I stand upon the parol of an old Confederate soldier. I have too often sworn allegiance to the Constitution, as it is now, with its judicial interpretations and its amendments, to forget my obligation, but I know this: I have always been true to its principles as I understood them, and as I understand them. There is no time to speculate upon what might have been if Oliver Ellsworth had held on a few months longer and President Jefferson instead of President Adams had filled the vacancy. The dead past has buried its dead, and there was many and many an one.

This is an indissoluble Union of indestructible States, and the imprint of John Marshall's pen, which was mightier than the sword, is upon it all.

But there is so much to say. I have not told you how, on the other hand, he moulded this same Constitution and its eleven amendments to be the very ægis of all our personal rights of life, liberty and property and reputation and the pursuit of happiness — how, after him, this same court permitted no military commission in time of peace to put its hand upon the citizen, no State or the General Government to deprive one of his privileges or immunities but by the law of the land — how our rights of property are held as sacred under this Constitution as was the humble cot of the English peasant, with regard to which the elder Pitt once said: "The poorest man in

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his cottage may bid defiance to all the forces of the Crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England cannot enter. All his force dare not cross the threshold of this ruined tenement."

It was in regard to this personal right of the Englishman the same great statesman also said: "Those iron barons (for so I may call them when compared with the silken barons of modern days) were the guardians of the people, and three words of their barbarous Latin, '*Nullus liber homo*,' are worth all the classics."

How it opened the prison doors to Milligan and Cummings; how it welcomed back Campbell and Garland to its bar in the face of *ex post facto* statutes; how it held sacred the right of property in the Lees!

While to the influence of Marshall as much as to that of any other man we may attribute the consolidated strength of this vast empire, to his influence we are also much indebted for the muniments of local government and vested right and personal liberty.

There are one or two of the ancient landmarks still left, such as election of Senators and of Presidents by the States, which, strange to say, our own people seem most anxious to remove.

And it is because of all these things that everywhere in the land to-day the courts and congresses and legislatures have joined the members of the legal profession in doing honor to the memory of this strong man whose powerful intellect controlled the wills, while the loveliness of his personal life captivated the affections, of the people.

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Marshall Day was celebrated in the town of Tarboro at a meeting held at the court-house, John L. Bridgers presiding, at which Paul Jones delivered an address on the life and labors of Chief Justice Marshall. Short addresses were also made by Frederick Philips, L. L. Staton and Mr. Bridgers.

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STATE OF SOUTH CAROLINA.

Marshall Day was celebrated in the Hall of the House of Representatives at Columbia. The Supreme Court of the State, at the request of the Bar of the State, ordered a special session to be held on Monday, the fourth day of February, to do honor to the memory of Chief Justice Marshall. Pursuant to order, the Supreme Court of the State assembled at eight o'clock p. m., and adjourned to the Hall of the House of Representatives. Mr. G. Lamb Buist of the Charleston Bar introduced, with fitting remarks, Charles H. Simonton, United States Circuit Judge for the Fourth Circuit, as the orator of the occasion. At the conclusion of the address of Judge Simonton, on motion of Mr. B. L. Abney of the Richland Bar, the court entered a minute extending to the orator for his address the appreciation and thanks of the members of the Bar of the State.

Address of Charles H. Simonton.

It has been frequently remarked that reputations acquired in the practice of the law are of an ephemeral character.

A great lawyer, in his day, commands the respect, confidence, and it may be the veneration, of his contemporaries. He fills the public mind, and his services are sought and valued. When his life has ended, others step into his place. His name soon becomes mere tradition. In a generation or two he is forgotten. Nor is this less the case with great judges. It is true that more frequently than is

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the case with practicing lawyers, they leave behind them, in their published opinions, more permanent memorials. But in the multiplication of reports, in the multitude of new questions which constantly arise, in the complete change in the character of cases which come before the profession, their decisions, buried in the reports, lose their value, meet with neglect, and are soon forgotten. Reputations which, at one time, seem destined to be lasting, pass out of the minds of men. The shadow of a name alone remains. How few of us can recall the names of the great judges which adorned the annals of the colonies, and of their greater successors, who presided over courts of justice and brought order out of chaos when independence was achieved and the several States grappled with the new questions which arose. To how many are there known the names and merits of the learned judges who now, in their own States, administer the law and are performing their part in the erection in this country of a fabric of jurisprudence which bids fair to rival, if not to surpass, that created by the sages of Westminster Hall. A few great names are repeated and honored beyond the limits of their own State. Among these no one has a wider reputation, has more impressed himself upon the institutions of the country, commands more the reverence of the profession and of the people, than John Marshall. He is universally recognized as the representative and the head of the American bench and bar.

We have met together upon no ordinary occasion. To-day, in every State of this Union, the bench and bar assemble to do honor to the memory of this profound lawyer and of this superb judge. Most fitting has been chosen, not the centenary of his birth or of his death. We commemorate the day upon which John Marshall was

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clothed in his judicial robe and entered upon that career which has won for him the title of the great Chief Justice. The bar, ever the most conservative body in the State, delight to do honor to the judge who was the truest type and example of strong, consistent and able conservatism.

John Marshall was born on the 24th day of September, 1755, in Fauquier county, Virginia — a neighborhood which gave to the country Washington, Madison, Monroe and Mason. Marshall's father and grandfather were men of note in their generation, and he grew up with all the advantages of education which the colony afforded. Just as he had finished his preparatory education and was beginning his preparation for the bar, the War of the Revolution began, and he took active service in the field. Toward the conclusion of the war he resumed his legal studies, was admitted to the bar, and rose rapidly to the head of the profession. His position at the bar secured him a seat in the legislature, and when the convention of the people of Virginia was called to consider the Constitution of 1789, he was chosen a member of that body. He was an earnest advocate of the adoption of the Constitution, and with Madison was largely instrumental, despite the strong opposition led by Patrick Henry and other great Virginians, in securing Virginia to the more perfect Union. He was offered by Washington the post of Attorney-General, but he preferred to remain at the bar of his native State. When John Adams became President, he was sent with Charles Cotesworth Pinckney and Elbridge Gerry on the memorable mission to France. On his return he was sent to Congress, declined the position of Associate Justice of the Supreme Court, which was then given to Bushrod Washington, and soon after entered the Cabinet of Mr.

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Adams, afterwards becoming Secretary of State. Whilst he was filling this high position the office of Chief Justice of the United States became vacant. The Secretary of State was in anxious consultation with the President with regard to filling this vacancy, and suggested several names of eminent lawyers for the place, when, unexpectedly to him, Mr. Adams announced that he had already made his choice. "I have selected," he said, "a plain Virginia lawyer, one John Marshall." Mr. Adams always considered, and declared this appointment, "the proudest act of his life." No appointment could have been more felicitous.

The Constitution of the United States was on trial. It had been adopted in convention, after long and earnest debate, by the most able men of the country, with grave apprehension. It had been ratified by the States only after able and fierce opposition. Nor did this opposition cease after its ratification. At once wholly conflicting views as to its construction gave birth to two strong parties. The experiment — for it was an experiment — was to be put into practical operation. The whole scheme of a written Constitution embodying the fundamental law of the Commonwealth was new. Very many of its provisions were declared for the first time. The whole system of the government was untried. It had to encounter the fears of the people, the jealousy of the States, the machination of politicians, who dreaded loss of power and patronage. A broad, comprehensive, original mind was needed for its construction. Purity of purpose, a blameless life, sublime courage, were needed for its administration. The wisdom of Mr. Adams found such a mind, and the man possessing these high qualities, in John Marshall. It has been well said that "if President Adams had left

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no other claim on the grateful remembrance of his countrymen than in giving to the public service this great magistrate, so pure and so wise, he would always live in that act as a great benefactor of his country."

In order to appreciate the magnitude of the task which lay before the new Chief Justice, and the importance of the services he rendered in expounding and applying the provisions of the Constitution, it is necessary to understand the causes which led up to, and the difficulties which surrounded, the adoption of the Constitution.

The movement which culminated in the American Revolution began simply in separate efforts in the several colonies to get redress from some oppressive acts of the English Crown. For this redress each colony looked to Parliament. In the progress of events the views of the colonies became enlarged. Disappointed in obtaining redress in England, they began to seek for it in themselves, and gradually, almost unwillingly, they drifted towards independence. To conduct the war which this necessarily occasioned, some sort of united action, controlled and directed by some common agency, was necessary, and the Confederation was formed — more in the nature of a league or an alliance than anything else. But the thirteen colonies, in the flush of independence, were not disposed to surrender their newly-acquired rights to the control of this central agency. They jealously watched its operations, and grudgingly gave it assistance. Somehow the war was carried on. The army, with great difficulty and with shameful parsimony, was kept up, and finally their independence was acknowledged by the mother country. They became and were sovereign and independent States.

Then began and continued what has been truly styled the critical period of American history. The new States,

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each for itself, sought its own immediate interest, became engaged in angry controversies, threatening war among themselves, neglected the Confederate Congress, took no steps to keep up the credit of the common government — turned a deaf ear to its requisitions for the common welfare, and brought the reputation of the country to a low pitch of degradation. Foreign governments openly showed their contempt for the successful rebels. Even its most ardent friends were disposed to despair of the new nation. Some of the colonies themselves began to indulge the idea of reunion with the mother country. The first thing that brought about reaction was the restrictions upon trade, which the several States, deceived by the attractive fallacy of protection, were putting upon what we now call interstate commerce. The anxious mind of Washington, filled with apprehension of failure for the results of the Revolution, took advantage of the unhappy results of this policy and the strong public feeling arising therefrom. He persuaded Virginia to propose to Maryland a consultation of commissioners of the two States in order to remedy this special evil. The proposition was accepted. Delaware and Pennsylvania were invited to join, and other States began to seek admission to the conference. But no one ventured to suggest any other action than such as bore upon the commerce between the States.

Finally a general invitation was sent out, inviting all the States to send commissioners to Annapolis, to consider how far a uniform system of commercial regulations might be necessary to the common interest and permanent harmony of the several States. So strong was the sense of independence in the several States, and so jealous were they of maintaining it, so averse to surrendering

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any part of it, that only five States sent commissioners to this conference. Four appointed commissioners who did not attend. Even Maryland appointed none, and Georgia, South Carolina and Connecticut took no part in the measure at all. No definite action was taken. Fortunately, New Jersey had added to the instructions of her commissioners, authority to consider as well commercial regulations as "other important matters." Acting upon this hint, the commissioners who did assemble issued an invitation to all the States to meet in convention at Philadelphia to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union, and to report to Congress such an Act as, when agreed to by them and confirmed by the legislatures of every State, would effectually provide for the same. Congress approved this suggestion and extended the invitation. All the States but Rhode Island sent commissioners — not, however, without opposition in many of them. They met in convention, deliberated for weeks. The Constitution of the United States was the result.

The general character and cautiously-worded language of the invitation show how keenly the actors in this movement realized the delicacy and difficulty of the task before them. Even when they had succeeded so far as to obtain representatives from every one of the original States but Rhode Island, they stood appalled by the magnitude of the work before them. The Confederation had proved a disastrous failure. The only escape from anarchy or despotism was the formation of a Federal Republic, with a central government strong enough to suppress lawlessness within, and to command respect abroad. Could the people be made to understand and

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accept such a Republic? Could the States be induced to surrender so important a part of their recently acquired sovereignty? Even the great soul of Washington was filled with the emotions of the hour. He closed his eloquent appeal to the convention at its opening session with these solemn words: "It is too probable that no plan we propose will be adopted. Perhaps another dreadful conflict is to be sustained. . . . Let us raise a standard to which the wise and the honest can repair. The event is in the hands of God."

The Constitution was adopted after earnest, conscientious and grave discussion, in the face of strong opposition upon almost every provision. On very many occasions the project almost failed of adoption at all, and its adoption was only brought about by the compromise of opinions stubbornly held and reluctantly abandoned. It is not going too far to say that the Constitution, as a whole, did not meet the wishes, scarcely obtained the approval, of the convention. Nothing but the dread of the anarchy which was threatened and impending under the Confederacy could have secured the partial unanimity with which the Constitution was finally passed.

A Constitution adopted under these circumstances must have been open to many differences of construction, and in many cases must have been difficult of application. As we have seen, the Constitution itself was an experiment. To its elucidation precedents were absent. The courts could only depend upon those grand principles which underlie all law, and which require for their discovery and illustration profound knowledge, breadth of intellect, unusual sagacity and strong common sense. A modern writer, speaking of this point, says: "American jurisprudence, in many respects different from English

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jurisprudence, of which it is an offshoot rather than a reproduction, was then in its infancy. American constitutional law was, of course, and by necessity, a science quite unknown to the common law, as well as to the British statutes, in which American lawyers had been previously trained. The creation of a National Government by the terms of a written paper was as yet a bold novelty, a brilliant but perilous experiment, made alarmingly complex by the existence of distinct sovereignties in the shape of thirteen States."

This Constitution John Marshall was called upon to construe. He was well equipped for the task. A trained lawyer, with large and successful experience at the bar; disciplined by a military experience in a trying time; broadened by his diplomatic duties in the delicate and difficult negotiations in France; aided by his service in Congress, and accustomed whilst Secretary of State to deal with the largest and most important questions; with a mind logical to a degree, with an "original and almost supernatural faculty of developing a subject by a single glance of his mind, and detecting at once the very point on which the controversy depends," with strong convictions and unfailing courage, he was the man of men to meet the demands of his position. The gravest questions were to come before him. The people in convention had carefully refrained from putting absolute, irresponsible power in any of the departments of the government. That absolute power was reserved in the people to be exercised through the ballot-box. The limitations upon the executive and legislative departments were carefully set forth. The rights and duties of the General Government were defined and fixed. Those portions of their sovereignty which were surrendered by the States were mi-

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nutely set forth. The powers remaining in the States were expressed or implied in general terms.

The Supreme Court was established and its jurisdiction embedded in the Constitution, unassailable by any legislation of Congress or of the States, to the end that it should be and remain the guardian of the Constitution. Here the strong instinct of the Anglo-Saxon race displayed itself, a government by law, expounded in the courts of law. Whatever steps the ambition of the executive or the passion of the legislative department of the government might be induced to take, in the exercise of the powers they derive from the Constitution, they were all liable to the cold scrutiny of the judicial department, unswayed by passion, governed by the fixed principles of law.

Naturally and necessarily, in the practical construction and application of the Constitution, each department and every member thereof would seek to secure for it the most liberal grant of its powers. The General Government and the States would come in conflict over the extent of their several rights. The States themselves, as the experience of the Confederation had shown, would be involved in controversies with each other. The property and interests of citizens, protected by the Constitution, would at times be threatened by attack of National and State legislation. The treaties made with foreign powers, the protection of ambassadors, the rights of our citizens as against them, required supervision and control.

All these questions, and many others which suggest themselves, were to come before that august tribunal, the Supreme Court, for adjudication and solution. Many of them did, in fact, come before the court during the presi-

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dency of John Marshall, and by his commanding genius were met, solved and permanently settled.

By the practice of the court at that time the cases involving constitutional questions were assigned to the Chief Justice, and the opinions were prepared by him. They cover a period of thirty-four years, and are to be found in the Reports from 1st Cranch to 9th Peters. It is unnecessary, on an occasion like this, to enumerate all these opinions, covering as they do almost every department of the law, and impossible to consider or discuss them. They all show the characteristics of the great Chief Justice. Quoting but few cases, dealing altogether with general principles, in a strong, logical argument, he lays down his premises and leads irresistibly to their conclusion. As Mr. Justice Story, his trusted associate, said of him: "It was a matter of surprise to see how easily he grasped the leading principles of a case and cleared it of all its accidental incumbrances; how readily he evolved the true points of the controversy, even when it was manifest that he never before had caught even a glimpse of the learning upon which it depended. Perhaps no judge ever excelled him in the capacity to hold a legal proposition before the eyes of others in such various forms and colors. It seemed a pleasure to him to cast the darkest shades of objection over it, that he might show how they could be dissipated by a single glance of light. He would by the most subtle analogies resolve every argument into its ultimate principles, and then with a marvelous faculty apply them to the decision of the cause." No better training can be found for the student of the law, no better exercise for the practicing lawyer, no better example for a judge, than in a careful and exhaustive study of these opinions of the Chief Justice. They are

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all models in their way, monuments in the history of the law, landmarks for the guidance of the profession.

When Marshall was appointed Chief Justice, the Supreme Court for the first time began its sittings at Washington. At the first term over which he presided came up the first case involving the constitutionality of an act of Congress. That arose in Marbury *v.* Madison, a petition for *mandamus* against the Secretary of State. It was a period of high political excitement. The Federal party had been beaten at the polls, and the party was in power which was openly opposed to the jurisdiction of the Supreme Court. Its action in this case was subjected to the most severe scrutiny and criticism. It was easy for the Chief Justice to have decided it upon a point which would have avoided the discussion that ensued. But he recognized the importance of the issues involved in it, and with sublime courage he faced adverse criticism and discharged his full duty. Answering seriatim the arguments presented with unusual force and ability by the counsel before him, he asserted the right and duty of the court to examine into the provisions of an act of Congress, and, if it be found to be in conflict with the Constitution, to declare that it has no existence in contemplation of law, and so is inoperative and void. An analogous ruling had been made in some of the colonial courts, notably in South Carolina.

But this was the first occasion in which the supremacy of this Constitution over any legislative action was involved. He demonstrated this supremacy with irresistible logic. His reasoning is as clear as a mathematical proposition and "his conclusion as inevitable as a problem of Euclid." The argument is put in a nut-shell. He presents this alternative. Either the Constitution is

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the paramount authority controlling any legislative act repugnant to it, or the legislature can alter, amend or modify the effect of a constitutional provision, by an ordinary act. Between these two positions there is no middle ground. If the first be true, then a legislative act contrary to, not authorized by, the Constitution, is, *ipso facto*, null and void. If the other be true, written Constitutions are absurd attempts to limit a power in its own nature illimitable. He then went into a discussion of the relation between the powers of the executive and its relation to the court. He shows the complete independence of the executive in all matters within its discretion, but he vindicates the authority of the court in controlling its ministerial functions. He recognizes, however, that the Constitution limits and controls the powers of the Supreme Court, and dismisses the case because it does not come within its jurisdiction. The principles announced in Marbury *v.* Madison were applied and illustrated in many of his subsequent decisions. By them he gave life and vigor to the Constitution, elucidated many of its provisions and put them into practical operation.

Among the great judges who adorn the annals of English and American jurisprudence, there stand forth conspicuously four names, to whom it was the fortune to inaugurate as it were a new era in the law, to broaden its principles and to establish precedents which have controlled and directed the principles upon which the law is administered. Each of them enjoyed long tenure of office, and each in his day commanded the reverence and secured the applause of the profession. Hardwicke, building upon the improvements in the administration of equity, introduced by Nottingham, raised this branch of

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the law into a science, and firmly established the wholesome and valuable jurisdiction of the Court of Chancery. Mansfield, bringing to the administration of the King's Bench his cultivated intellect and profound learning, and aided by knowledge and experience in the civil law, rescued the common law from the narrow technicalities so dear to the serjeants, and laid broad and deep the principles of the law merchant. Sir William Scott, Lord Stowell, raised the ecclesiastical and admiralty courts above the petty questions, crude methods and narrow principles which before his time characterized them, and created a body of admiralty and ecclesiastical law in decisions, whose charm and beauty of diction are still the admiration and envy and despair of the profession. Marshall excelled each of these in his massive intellect and convincing logic, and created a body of constitutional law, in which he had no other guide than his own intellect, and for which the precedents were to be created by himself.

Not only did the Chief Justice demonstrate his ability in the appellate court; he was equally eminent on the circuit. It is a mistake to suppose that higher qualifications are necessary for the appeal bench than for the circuit bench. A judge on circuit must be learned, quick of apprehension, equable of mind, with clear common sense. He is constantly called upon to meet issues and to decide questions of which he has had no intimation. In the opening of a cause, in the examination of witnesses, in the requests for instructions, in the arguments of counsel, these questions are sprung not only on him but on the lawyers engaged in the case. They are presented with all the ingenious plausibility characteristic of the profession. They must be met and decided at once after argument,

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often necessarily imperfect, and must be solved by the judge sitting alone, almost always unaided by authorities.

In an appellate court, counsel appear with full opportunity of preparing their own case, fortified by authorities, provided by an endless number of digests, bearing more or less upon the case, and advised of the main points of their adversary. Both sides are usually exhaustively discussed. The court have full time for conference and consideration, and, the conclusion having been reached by an interchange of views, the opinion is prepared in the solitude of a library.

When all the disadvantages are considered under which the circuit judges labor, it is a matter on which we at our bar should congratulate ourselves that their decisions at *nisi prius* are so often affirmed.

At *nisi prius* the Chief Justice left nothing to be desired. By an excellent provision of the Federal law, the Justices of the Supreme Court are required to go upon circuit and thus practically administer the law. He held these courts in North Carolina and Virginia. Often in turning over the dusty files of decided cases in these courts, one comes upon a reported case heard by him, in which he displays his wonted power. The most famous of his circuit cases is the great trial of the United States *v.* Burr. The distinguished prisoner was prosecuted with all the power of the administration, stimulated not only by the serious character of the offense charged, but also by personal and political hostility. His name was execrated by a large and influential portion of the people, who were prepared to believe him guilty, not only of the treason charged, but of any or of all crimes in the decalogue. His politics and his principles differed, *toto coelo*, from those of the judge before whom he was tried.

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The whole country looked on, anticipating, perhaps hoping for, but one result of the trial. Surrounded by these circumstances, during a long and exciting trial, in which were used all the learning, eloquence, ability and ingenuity of a most able bar prosecuting and defending, in which the accused himself took no unimportant part, the Chief Justice, with steady hand, kept the scales of justice evenly balanced, and, in the concurrent opinion of the prosecution and the defense, swerved ne'er a hairbreadth from the true line of justice. In the conclusion of his charge to the jury, he showed his appreciation of his position, and demonstrated the courage with which he met it. He ends with these words, which should be impressed on the mind of every judge:

"That this court dares not usurp power, is most true. That this court dares not shrink from its duty, is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

Of his personal qualities we have not time to speak. Modest and unassuming, though full of dignity, amiable and affectionate; at all times easy of approach; of the most simple character in manners and dress, he was venerated, loved and honored in the city of Richmond, where he had made his home. His name and his memory are still fragrant in that historic city. Nor was this veneration

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and love for him confined to this city or to the State of Virginia. The whole Union appreciated and honored their Chief Justice.

When, at the end of his long career, he laid down his office with his life, the entire land mourned him, and the Bar everywhere put on enduring record their estimate of the man. The resolutions adopted in South Carolina at a meeting of the Bar have been honored by the Supreme Court with a place among the official reports. They appear in 10th Peters and can well bear repetition here:

"Death has removed from the sphere of his duties John Marshall, the venerable Chief Justice of the United States, a magistrate endeared to his countrymen by a pure and spotless character; distinguished by pre-eminent abilities and illustrious by his long and varied public services. The sympathy of a whole people attends the funeral of a public benefactor, whose life conferred honor on his country. But the law and legal profession, of which he was the head and the ornament, are more than any others interested and affected by this solemn event. His high judicial station was equally above envy and reproach, and the honor of official dignity was enhanced and ennobled by his intrinsic worth and personal merit. Though his authority as Chief Justice of the United States was protracted beyond the ordinary term of public life, no man dared to covet his place or express a wish to see it filled by another. Even the spirit of party respected the unsullied purity of the judge, and the fame of the Chief Justice has justified the wisdom of the Constitution and reconciled the jealousy of freedom to the independence of the judiciary."

Brethren of the profession of the law, we live in a

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strenuous age. The chief characteristic of the century just past is change. It has left to us this legacy:

"With smoking axle hot with speed, with steeds of fire and steam,
Wide waked To-day leaves Yesterday behind him like a dream.
Still from the hurrying train of life fly backward far and fast
The milestones of the fathers, the landmarks of the past."

Our profession has caught the impetus, and we, too, are hastening away from the landmarks of the past.

It is well, in the multitude of improvements suggested to us, that we should cultivate the conservatism of which Marshall was so conspicuous an example.

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STATE OF GEORGIA.[1]

In commemoration of the accession of Chief Justice Marshall to the United States Supreme Court bench, a meeting was held in Georgia, in the Capitol at Atlanta, on February 4, 1901. A large number of members of the Bar from different portions of the State gathered in the Supreme Court room at eleven o'clock, where, headed by the judges of the Supreme Court and the officers of the Georgia Bar Association, they proceeded to the Hall of the House of Representatives. There were present Chief Justice Simmons, Presiding Justice Lumpkin, Justices Little, Cobb, Fish and Lewis, Judge W. T. Newman of the United States District Court, the judges of the Superior and City Courts of Atlanta, and a large number of men, women and students in the schools of the city. Chief Justice Simmons called the assemblage to order, after which Attorney-General Terrell stated the occasion and purpose of the gathering and announced the programme of the exercises.

Hon. H. Warner Hill, President of the Georgia Bar Association, addressed the court as follows:

Address of H. Warner Hill.

Of the three great departments perhaps the most important of our government is the Judicial. It stands as

[1] The proceedings in this State were published in pamphlet form, with the following title: "Addresses before the Supreme Court of Georgia in honor of the centennial of the accession of John Marshall to the Bench as Chief Justice of the United States. Under the auspices of the Georgia Bar Association. Atlanta, Ga.: The Franklin Printing and Publishing Co., 1901."

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a great bulwark of the rights and liberties of the people against invasion of those rights and attack from any source. Congress can pass and the President approve a proposed law, but it is for the highest court in the land to say whether it is of living force. No provision of the Constitution of the United States is so potent in preserving the liberties of the people as the one creating the Supreme Court. Composed originally of six, now nine, members, this august tribunal has, as a rule, had for its judges men of great legal learning and character. From John Jay, its first Chief Justice, who was appointed by Washington in 1789, to the present time, it has always been a great court and composed of great jurists. Mr. Garland, the Attorney-General under Mr. Cleveland, in his book of reminiscences says: "It is the anchor — and, not to mix metaphors too freely — the safety-valve of our government." He places the general estimate upon it when he says: "It is a great court, great in its conception, in its make-up and in its jurisdiction."

By common consent the greatest genius who ever presided over this august tribunal, and made it largely what it was and is, was the immortal Chief Justice whose memory we to-day meet to commemorate. John Marshall is perhaps the most illustrious of all the great judges connected with American jurisprudence. His career was a most remarkable one. Born, as every lawyer knows, at Germantown, Fauquier county, Virginia, September 24, 1755, he died in Philadelphia on the 6th day of July, 1835. Beginning life as an officer in the army, he served first as lieutenant, then as captain, in the American Revolution, and saw active service at Brandywine, Monmouth, Stony Point and Germantown, and was with Washington at Valley Forge. But he was destined for

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a lawyer and not a soldier; and being admitted to the bar in 1781, after attending lectures under George Wythe, afterwards Chancellor Wythe, at William and Mary College, was soon thereafter chosen to a seat in the legislature of Virginia in 1782, where he remained as an active and leading spirit for some time. Resigning his seat, he resumed the practice of his chosen profession at Richmond, with marked success and ability.

Being tendered the positions of Attorney-General and Minister to France by Washington, he declined both, but afterwards served as special envoy to France in 1798. In 1799 he was elected to Congress, and later served as Secretary of War and of State. His chief glory was achieved while on the Bench as Chief Justice of the Supreme Court of the United States, to which position he was appointed by President Adams just as the nineteenth century was being ushered in, on the 31st day of January, 1801, and qualified on the 4th day of February one hundred years ago to-day, and for thirty-four years this great man, soldier, lawyer, legislator, minister, diplomat, historian and delegate in the convention of Virginia, met every obligation which devolved upon him to the eminent satisfaction of his friends and the admiration of the entire country. Appointed to the position of Chief Justice in the infancy of our judicial system, when only forty-six years of age, it was his pride and glory to develop it, until it took rank with the first courts of earth. His career as Chief Justice is distinguished for the length of his service and the impartiality and ability with which he presided. His decisions in such cases as Marbury *v.* Madison, 1 Cranch, 137; Sturges *v.* Crowninshield, 4 Wheat. 122; McCulloch *v.* Maryland, 4 Wheat. 316; Dartmouth College *v.* Wood-

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ward, 4 Wheat. 518, and Gibbons *v.* Ogden, 9 Wheat. 1–240, will forever remain imperishable monuments of his legal wisdom and learning and interpretation of constitutional law. If time permitted it would be interesting to review these celebrated cases, but one extract will suffice to show his reverence for the law and the Constitution.

In the case of Marbury *v.* Madison, where the President of the United States had issued a commission to a justice of the peace in the District of Columbia, but which was withheld from him, although it had been signed and the great seal of the United States attached, Marshall said: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of the court. The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve that appellation if the laws furnish no remedy for the violation of a vested legal right. It is not entirely unworthy of observation, that, in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution have that rank."

Naturally of a judicial temperament, he never became a partisan, but adhered strictly to the law as applicable to the case at bar without respect to who the parties or counsel were.

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"In the discharge of his high duties," says a distinguished writer, "there was so much gentleness, modesty and simplicity united with such depth and compass of mind, that the profession *loved* him quite as much as they admired and respected him. His demeanor on the bench was a model of judicial dignity and courtesy. Whether the counsel was eminent or comparatively little known, he listened with the same attention, patience and respect." "He was endowed by nature," says Mr. Binney, "with a patience that was never surpassed — patience to hear that which he knew already, that which he disapproved, that which questioned himself. When he ceased to hear it was not because his patience was exhausted, but because it ceased to be a virtue."

While a great judge in all the branches of the law, his most enduring fame and pre-eminence was in expounding the Constitution. When, in 1801, Marshall took his seat upon the Supreme Bench, this republic was in its infancy and largely an experiment. What the Constitution was and meant had never been declared by the highest courts of the land. But as early as 1805, Marshall declared that "the United States for many important purposes form a single Nation. The States are constituent parts of the United States." He promulgated the rule that "neither a strict nor a liberal interpretation, but the plain meaning of the words, should govern" in the construction of the Constitution of the United States. Being called upon so early in our judicial history to expound the Constitution on so many questions, and having discharged that important trust so ably and well, it was fitting that he should have been called the "Father of the Constitution." It has been well said that "Marshall found the Constitution paper and made it power; he found it a skeleton, and clothed it with flesh and blood."

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In his "Lives and Times of the Chief Justices," Mr. Flanders observes that in his reasoning the great jurist "proceeded onward to his conclusions. He did not incumber himself nor embarrass others with a mass of authorities. Discerning, as if by intuition, the principle upon which the decision must depend, he did not look for cases either to illustrate or support it. Witness his judgment in the Dartmouth College case. In truth, however, on questions of constitutional law, there were no precedents to guide him. He was necessarily obliged to rely on the native strength of his mind; and it is here that his unrivaled penetration, his powers of analysis and combination are most conspicuously displayed. In acquisitions, in various legal knowledge, he has been surpassed by others, but for grasp of intellect and profoundness of judgment, where shall we look for his equal? He was less dependent on mere learning than others, for so distinguishing were his faculties, and so exquisite his penetration, that he unfolded the original principles which lie at the very foundations of the law."

Coming upon the bench in its infancy, when less than one hundred decisions had been rendered by his predecessors, it devolved upon this young jurist "to lay the foundations and rear a framework of a new kind of jurisprudence in which the matters of litigation are enlarged to include the most profound questions of statesmanship and the very structure and powers of government itself." That he laid the foundations broad and deep, wisely and well, and builded a judicial structure that will stand the test of time, his judicial opinions covering a period of over a third of a century surely attest.

Such a man would have been great and attained dis-

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tinction in any vocation of life, but Marshall, while he could and would have achieved success as a statesman had he remained in political life, built well an imperishable monument in the decisions he left behind during his long and eventful career, and in his "History of Washington," and his "History of the Colonies."

Chief Justice Fuller has said of him that "in mere learning he has been surpassed by some, but in pure reasoning by none." It is related that at the conclusion of the delivery of one of his logical and unanswerable opinions Marshall added: "These seem to me to be the conclusions to which we are conducted by *reason* and the *law*. Brother Story will furnish the authorities." In studying the life and character of Marshall, especially his judicial career, one is led irresistibly to the conclusion that there was strongly implanted within him a desire to base every legal conclusion upon the principles of sound law, justice and right. He sought that which is the object of every legal investigation — the truth; and usually found it. When he stated the facts of a case in his simple but strong way, the natural conclusion followed as certainly as any demonstration in mathematics. This intuition, or art of reasoning, if you prefer, scores a great advantage in a judge seeking for the true light. This God-given talent Marshall possessed in the highest degree.

At an earlier period of our judicial history, Marshall was often compared with Story and Taney by those who saw in the latter points of excellence over those of the former; and while it may be admitted that Story was more *learned*, it is believed that in view of the great crises in our judicial and national history through which the

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former passed, and probably averted in a measure by his exposition of our fundamental law in a perilous period of our infancy, impartial history will accord him a higher rank in judicial eminence than either of the others have been able to attain. As Americans we are proud of them all, but as Americans far removed from the jealousies always existing when the participants are on or near the scene of action, it must be, and I believe is, conceded, that Marshall reached the highest point upon the mountain range of judicial distinction and greatness ever attained by an American judge.

Indeed, his contemporary and colleague, the great and learned Story himself, paid this among other tributes to his chief: "Enter but that hall and you saw him listening with a quiet, easy dignity to the discussions at the Bar; silent, serious, searching; with a keenness of thought which sophistry could not mislead or error confuse or ingenuity delude; with a benignity of aspect which invited the modest to move on with confidence; with a conscious firmness of purpose which repressed arrogance and overawed declamation. You heard him pronounce the opinion of the court in a low but modulated voice, unfolding in luminous order every topic of argument and measuring its value, until you felt yourself in the presence of the very oracle of the law." Story also said that "next to Washington, he stands the idol of all good men. And who so well deserves it?"

As already intimated, Marshall was exceptionally learned and strong in his interpretation of the Constitution. It has been said that to pay a tribute to Marshall is to write a history of American constitutional law. His decisions are the embodiment of clearness, logic, rea-

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son and law, and will live and be quoted as long as there are courts of law and justice.

> "As in the heavens the urns divine,
> Of golden light, forever shine —
> Though clouds may darken, storms may rage,
> They'll still shine on from age to age."

Mr. Wirt, the great orator, lawyer and statesman, has said of this extraordinary man that "he possesses one original and almost supernatural faculty, the faculty of developing a subject by a single glance of his mind, and detecting at once the very point on which a controversy depends. No matter what the question, though ten times more knotty than 'the gnarled oak,' the lightning of heaven is not more rapid or more resistless than his astonishing penetration. Nor does the exercise of it seem to cost him an effort; on the contrary, it is as easy as vision. I am persuaded that his eyes do not fly over a landscape and take in its various objects with more promptitude and facility than his mind embraces and analyzes the most complex subject."

One notable characteristic of this truly great American, as indeed it is of most great men, was his simplicity of manners, habits and form of expression. Although not a college graduate, the most abstruse and complex questions of law and fact were stated by him with such clearness and precision, and yet in strong but simple forms of expression, that what seemed complex was made to appear simple and plain.

Many incidents of his simplicity of character have been told and are familiar to every reading American, but none perhaps shows forth the simple faith of this great Chief Justice more strikingly than the fact that he never

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retired at night to rest after the toils of the day were over without repeating the simple lines taught him by his mother when a child, beginning: "Now I lay me down to sleep." What simple, yet sublime faith, and the power of a mother's influence over the mind and character of her children, even when they have grown into manhood's estate, and occupy the first positions in the republic!

Many personal incidents of his life which illustrate his character are recorded, and which no doubt are familiar to most Georgians.

Our great Chief Justice was a very religious man. On one occasion he was riding through his native State of Virginia in a gig — a vehicle much used in those days — and before reaching his destination he stopped for the night at a "tavern." One shaft of his gig had been broken and tied with a hickory withe, and his shabby personal appearance gave every indication of a plain countryman. At the hotel were stopping other guests, and among them several young lawyers. Seated around the office the discussion soon turned upon the Christian religion, and one of the young lawyers, evidently from his argument an atheist, was getting the better of his fellows. Turning finally to Marshall, who was unknown to the company, with an air of triumph, he asked of the "old man" what he thought of such things. "If," said an eye-witness, "a flash of lightning had struck in their midst from a clear sky, it would not have been more startling than the 'old man's' reply. They listened spell-bound for an hour as the great Chief Justice talked of the Christian religion as learnedly as if expounding some great constitutional question. Imagine the surprise of the young lawyers when they found that the eloquent and learned but

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homely 'old man' was the great Chief Justice of the United States."

Few judges have ever presided for a longer period than Marshall. During his long incumbency of thirty-four years, England had within that time four Chief Justices in the persons of Kenyon, Ellenborough, Tenterden and Denman, and four Lord Chancellors, Eldon, Erskine, Lyndhurst and Brougham. And he was Chief Justice during the administration of six of our most distinguished Presidents, namely: John Adams, Thomas Jefferson, James Madison, James Monroe, John Quincy Adams and Andrew Jackson.

Marshall had many and varied characteristics. In his private life he was pure, plain and simple; in personal appearance, tall, lean, awkward and ungainly; a sincere Christian, an amiable, true friend. His domestic life was an ideal one. The death of his wife in 1831, to whom he was fondly attached, was a great blow, and he never fully recovered from the shock. When speaking of her afterwards to his friend Story, this great and strong man wept like a child. As a jurist he was profound and wise; always aimed at "strength" and attained it. His decisions are models of simplicity, wisdom, strength, justice, reason, logic and the law; and it is amazing with what apparent ease his keen analysis could make plain the most difficult problems.

Considering his great achievements and spotless character, the lofty example he set posterity in private and public life, it is eminently fit and proper in the beginning of this new century — on the centennial anniversary of his accession to the bench — that we meet in this temple of justice and do honor to his memory as it is being done throughout the nation. Wherever the English language

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is spoken and American jurisprudence is studied and known, the name of Marshall will shine in the legal firmament, luminous as the stars in an unclouded night, and be cherished and revered in the hearts of Americans, for his purity of life and integrity of character, his statesmanship and pre-eminent legal attainments. History will perpetuate his memory and fame, and accord him a place among the great of earth, but history alone is not necessary to perpetuate it, for the remembrance of his greatness and goodness will linger and live always in the hearts of the American people.

Burton Smith, member of the John Marshall Day Committee of the American Bar Association, addressed the court, in part, as follows:

Address of Burton Smith.

When, one hundred years ago to-day, the solemn oath of office was taken by the fourth Chief Justice, John Marshall, he found a written Constitution to be construed, and a nation whose future was dependent on that construction. I say he found a nation whose future was dependent on that construction; this is scarcely true: he found what might become a nation, but what was then a heterogeneous mass of antithetical peoples, loosely held by a feeble bond.

Marshall's father was a man of education and reading, and under him the future Chief Justice read thoroughly and deeply the great classics of English and Roman literature; this in itself was a liberal education. But while a man of the people, he was also, like Washington and Madison, an intense believer in the necessity of strengthening the central government. He believed that if this

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country should ever fall it would not be through the tyranny of the National Government, but through bonds so loose that States would draw away.

Upon the threshold he met the paramount issue which has made his reign upon the bench famous and a power for all time. It was, "Maintain the authority of the Federal Government."

The first great constitutional case decided by Marshall was that of Marbury *v.* Madison. . . .

An epoch in the world's history! The highest court in the land asserts and exercises the right to declare void a law passed by the highest legislative body in the land, by the very law-makers who placed the judges of the court upon the bench. A bulwark of liberty and civilization, towering above all others erected by the Anglo-Saxon race! While this act was considered by President Jefferson a defiance of the executive and legislative branches of the government, the remarkable fact remains that, although Jefferson and Marshall were open, mutual opponents — personal and political,— and neither made any effort to conceal it, nevertheless the first enunciation by the Supreme Court of its right to declare an act of Congress void constituted a refusal to interfere with Jefferson in his administration of the government.

But while Marshall never hesitated to hold void an act which he deemed unconstitutional, it must not be thought that he approached these questions with any feeling of passion or prejudice. In an opinion he says: "The question whether a law be void for its repugnance to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. But the court, when impelled by duty to render such judgment, would be unworthy of its sta-

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tion could it be unmindful of the solemn obligations which that station imposes." Such language as he uses here, and in other cases, shows him to have been deeply impressed with the gravity and solemnity of constitutional issues. . . .

A striking illustration of the continued difference in opinion on the question of Federalism was shown recently at a discussion of the celebration of this day. A number of gentlemen were present and two distinguished jurists of this State expressed their opinion of Marshall. One said, "Marshall's opinions made him an enemy of the Constitution and the nation, and his decisions destroyed one and sought to destroy the other." The other jurist replied, "Without Marshall there would have been neither Constitution nor nation; he preserved the Constitution and made the nation possible." Whatever we may think of Marshall's construction of the Constitution, this much is true: we are to-day living under that construction. From the necessary results of that construction there was no appeal save to the sword. That appeal was tried from '61 to '65, and the decision is final and irrevocable. Nor did Marshall ever extend the powers of the Federal court to invasions of private rights. He was deeply imbued with the necessity of a strong government, and believing that the forces in our Union possessed far more centrifugal than centripetal power, and believing also that the Constitution was intended to furnish the centripetal and counteract the centrifugal, he unwaveringly and in all cases stood by his convictions and maintained them in spite of all opposition, even though opposition often came in later days from the allies and friends of his youth, and even though towards the last the gallant band that had labored with

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him in the framing of the Constitution dropped away in death, until those who still thought with him seemed but a handful.

He possessed a calm, clear, penetrating, well-trained, accurate intellect; intense devotion to what he thought was right; a fixed conviction of the needs of the growing nation; placid indifference to public opinion and to fame; utter fearlessness, mental, moral and physical; and close, passionless, remorseless logic. These made him the great Chief Justice.

The gentleness and beauty of Marshall's private life and character is a theme to which the mind turns fondly from his stern judicial career. He grew up in a happy home. As a boy, he was an affectionate and gentle brother, a dutiful and respectful son. Possessed of infinite reverence for woman, seeing in her the companion, the friend of man, his superior in moral and religious sentiment, Marshall looked with contempt upon the scoffs and sneers directed against her by the cynics and weaklings of his own sex. His domestic life was singularly happy, for he married in early manhood a devoted and adored helpmeet —

"With whom for more than forty years his life in golden sequence ran,
She with all the charm of woman, she with all the breadth of man."

From his children Marshall received respect, obedience and affection; to them he gave affection, counsel and example.

The American Bar Association, a non-political body of lawyers, has called this day to the attention of the American bench, bar and people, because we are living under John Marshall's construction of the Constitution,

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and because Marshall himself, in his life and character, presents a noble object for study and imitation. And to-day the Supreme Court of Georgia, the Supreme Court of the United States, and the courts of almost every State in the Union, the public schools, law schools and colleges of the nation, are exhibiting to old and young the inspiring example of his noble career.

B. F. Abbott, President of the Atlanta Bar Association, addressed the court substantially as follows:

Address of B. F. Abbott.

The Bar of Atlanta greets the Judges of the Supreme Court, the Judge of the United States District and Circuit Court, the Judges of the Superior Courts, the Judges of the City Court, and the distinguished President of the Georgia Bar Association — ladies and gentlemen present, and especially the one hundred and fifty representatives of the Girls' High School, all of whom have graced this occasion with their presence and joined in the observance of this anniversary. For the first time in the history of the Republic has the legal profession observed the anniversary of the elevation to the Supreme Bench of any of its judges. The movement looking to the celebration of this day, originating as it did in the American Bar Association, has met a ready response from the Bar in all portions of the country.

The ceremonies of this day are not alone significant because the name of John Marshall is honored, but it has a wider and more far-reaching effect in that we do honor to the law and to its supremacy, as the conserving and preserving power, which defends and protects the life, the liberty, and the property of the citizen. It is to the law and its due administration that we confidently look

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for the preservation of these inestimable benefits. We do honor, also, to the legal profession — that force which, in all ages of enlightened civilization, has been placed in the forefront, not only in the administration of the law, but in the making and execution of the law.

John Marshall was placed at the head of the Federal Judiciary one hundred years ago to-day.

It would not be appropriate, nor have I the time in this presence, to indulge in any extended notice of the life and character of this remarkable man. It is not necessary.

The impartial student of history will, no doubt, admit that John Marshall was one of the greatest lawyers of modern times. No man connected with the Federal Judiciary has so indelibly impressed thereon the stamp of his individuality, learning and ability. Cast in that heroic mould which prepares for great labor and responsibility, he came into the full tide of official activity at a time which accentuated his greatness and usefulness in civic affairs. For breadth of mind, vigor and clearness of thought, acute perception of legal principles, for fathoming the depths of great and difficult questions and stating the results of his investigations in terse and vigorous English, he stands without a superior among the lawyers of this or any other country.

Nature made Marshall great. He had not the advantage of a liberal education. He was largely self-taught. Drilled in the school of varied experience, first as a soldier, then as a lawyer, legislator, member of Congress, minister to France, Secretary of State, and, lastly, Chief Justice, this enabled him to acquire an intimate knowledge of men as well as the law. He was born to be a leader in the law — to lead the way over theretofore untraversed ground. He

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was, perhaps, the most active force among the delegates in bringing about the ratification of the Federal Constitution by the Convention of the State of Virginia. He seems to have had a peculiar knowledge of the science and practical structure of government as well, and this enabled him to use his great powers with the facility that few others could have done.

He belonged to a school of politicians and affiliated with the party of which Washington was the acknowledged head. That party was opposed by that other great political party under the scarcely less distinguished leadership of Jefferson. While political conflicts then, as now, were not without bitterness and rancor, no word of suspicion was ever uttered against him as a man, nor was his political integrity ever challenged; and all, of whatever shade of political opinion, accorded to him that best meed of all praise — honesty and integrity of purpose. It was under these conditions that his character shone with peculiar luster.

At the time of his elevation to the Bench the Constitution was comparatively new. It was still more or less an experiment, and many difficult and grave questions were constantly being brought before the court for a decision. His labors in the construction, adjustment and application of the provisions of that great instrument to the conditions then existing were far more important and extensive than those of any other man on the Supreme Bench.

His understanding of the subject was broadened and quickened by careful study of its provisions bestowed whilst he was a member of the Virginia Convention, and in which body some of his ablest speeches were delivered. It was Marshall more than any other man who shaped and moulded judicial opinion on constitutional law, and turned

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it into grooves from which it has never been diverted. However much some may have differed with him in his doctrine of Federal supremacy, and that difference was wide and radical, nothing has ever tended to minimize his great learning and ability.

It would be wholly inappropriate to discuss the right or the wrong of the views held by Chief Justice Marshall. That field of controvery was entirely covered by the great leaders of both sides during his term of office and since. The discussions upon the points of difference on constitutional law in legislative halls and at the forum would fill many printed volumes. These discussions are useful now only in that they may be considered a part of the history of the times. Any one desiring to see the opposite view on an important question of constitutional law to that held by Chief Justice Marshall may consult with considerable profit the exhaustive opinion of our own Supreme Court, speaking through Justice Benning in the case of Paddleford, Fay & Co. *v.* Mayor and Aldermen of the City of Savannah, to be found in 14 Ga. 438.

Statesmen and soldiers are commemorated in marble and bronze as a reward for wisdom, patriotism and valor, but how few of those patient toilers in the judiciary who have meted out to the rich and the poor even-handed justice without favor or affection for either, live in sculpture or painting! For one, I readily join in any concerted movement to pay tribute to the greatest of our dead judges for their eminent and useful services in the administration of the law.

He died in 1835. Memorial exercises were held in the Supreme Court room in the city of Washington, at which were the leading representatives of all the departments of the government. In the city of Charleston, S. C., a

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meeting of the bar was held to take suitable action in reference to his death. It was presided over by Judge Lee of the United States District Court. Beautiful resolutions were presented by the Hon. James L. Petigru, and according to the report of the proceedings were "eloquently seconded by the Hon. Mitchell King." This memorial is published in 10 Peters Reports. I mention this to show the estimate placed by the bar on Judge Marshall as a judge and a lawyer in the South without respect to political opinions, and in the section of the Union where the greatest opposition was always shown to his views on certain great constitutional questions.

He truly magnified his office. When we honor John Marshall we honor ourselves and the nation, we honor the noble profession he so splendidly ornamented and adorned. His name and fame should inspire the young with ambition and satisfy the weary and worn with their noble profession.

And finally, the learning and genius of this great man — this rare American product — will shed a radiance and lustre on the pages of our judicial history so long as the Constitution and the law are the ruling forces in the government of the nation.

Response of Presiding Justice Lumpkin, on Behalf of the Court.

A request of Chief Justice Simmons devolves upon me the duty of responding for the Supreme Court of Georgia to the addresses which have been delivered.

Their fulness, attention to detail and eloquent presentation of the life, character and public services of Chief Justice Marshall leave little to be said. During the hundred years which have elapsed since the 4th day of Feb-

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ruary, 1801, the names of many Americans have been written upon indestructible rolls of honor and imperishable tablets of fame. A bare list of them would make a long and glorious catalogue. The briefest recital of their achievements in statecraft, in letters, in art, and in arms would fill volumes. America may well be proud of the men she gave to the world in the nineteenth century. In such an age and among such examples it would be hazardous indeed to say that any man stood above all the others pre-eminently conspicuous; and yet it may with reasonable safety be asserted that no one of all the illustrious Americans who lived during this period so thoroughly impressed his influence upon the institutions of his country as did the great Chief Justice.

He did not make the Constitution, but he, more than all others, had a voice in its construction. Many of its controverted clauses bearing upon the most important of governmental questions are to-day understood and enforced as he expounded them. We live, as has already been stated, under a fundamental law the meaning of which Marshall proclaimed in numerous opinions delivered during about a third of a century from his exalted station as the head of the Federal judiciary. His utterances were of more import, and his power greater by far, than that of the men who phrased the provisions of our supreme organic law. Detracting nothing from his associates, it is certainly the truth that he was not only, by virtue of his title, in name, but, by reason of his work, in fact, the chief oracle of constitutional interpretation. Without reference to any other feature of his judicial career, or to his eminent services in other branches of public duty, all of which have been sufficiently covered by what has been already said on this occasion, what

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higher place could any man occupy in the chronicles of a great nation?

While many whose opinions are entitled to the profoundest respect have differed, and will continue to differ, from the doctrines he laid down, no one has ever questioned, or will ever question, the purity of his soul or the integrity of his mind. He was morally upright and intellectually honest. His every decision was steadfastly true to his convictions of right. Not the smallest spot, the offspring either of charge or suspicion, ever stained the snowy whiteness of the ermine he wore. It is, we think, most becoming that the judiciary and the bar throughout this broad land should befittingly commemorate the one hundredth anniversary of his accession to the Chief Justiceship. It was a great and glorious day for our highest court and for our country, when this matchless lawyer, this trained thinker, this noble patriot, and, withal, this modest and unselfish Virginia gentleman, became its official head. No tribunal has ever commanded more universal respect, no jurist has ever stood higher in the annals of legal history.

Let this present day mark with pronounced emphasis and fixedness of purpose the beginning of a new era for emulating his resplendent virtues and his grand career. Few, if any, can ever equal his attainments, but each may strive to approach as closely as in him lieth to the magnificent standard of judicial excellence which characterized his work.

An appropriate order for preserving the record of this day's proceedings will be entered upon our minutes.

Abstract from the Minutes of the Court.

Exercises were this day held in commemoration of the one hundredth anniversary of the accession of John Marshall to the office of Chief Justice of the Supreme

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Court of the United States. The same consisted of addresses by H. Warner Hill, President of the Georgia Bar Association; Burton Smith, member of the Committee of the American Bar Association on the celebration of John Marshall Day, and B. F. Abbott, President of the Atlanta Bar Association, with a response from the court by Presiding Justice Lumpkin.

It is ordered that the above be entered on the minutes for the purpose of preserving a record of the facts therein stated.

This February 4th, 1901.

Exercises at Savannah.

On the evening of February 4, 1901, in the United States District Court room at Savannah, an address was delivered, at the request of the Chatham County Bar Association, by the Honorable Emory Speer. Judge Speer was introduced by the Honorable Robert Falligant, Judge of the Superior Court of Georgia.

After reviewing the incidents of Marshall's life[1] and his public career and services, Judge Speer continued:

Address of Emory Speer.

The august court of which he was now the chief judge is purely an American creation. Early in its history it was said by De Tocqueville: "A more imposing judicial power was never constituted by any people. The Su-

[1] In the course of his review of Marshall's life Judge Speer referred to Marshall's mother, and to the resemblance between the characteristics of Marshall and those of Field Marshal Keith, Frederick the Great's great lieutenant, in the following language:

"Of the mother of John Marshall much is not known. She belongs

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preme Court is placed at the head of all known tribunals both by the nature of its rights and the classes of justiciable parties which it controls." The great critic of

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to that period in the society of the Old Dominion so delightfully portrayed by Thackeray in his "Virginians," but I am quite sure that, unlike the Lady Esmonds of her times, she did not in stately brocade or rustling silks glide through the mazes of the minuet or prance with alacrity in the contra dance. She had other engagements. She was the mother of fifteen children, of whom the future Chief Justice was the eldest, and such was her solicitous care that she reared them all until they were grown. It will be seen that this noble Virginia dame measured well up to the standard of feminine greatness defined by the malice of Napoleon for the contemplation of Madame de Stael. Her maiden name was Mary Isham Keith. Her father was an Episcopal minister and a full cousin of that famous Field Marshal James Keith, perhaps the most renowned of the lieutenants of the Great Frederick. It is said that all great men are the sons of great mothers. The rule is general, but not universal. It is safer perhaps to say that great men are almost invariably the offspring of parents whose marriage has been the outgrowth of mutual disinterested affection, and whose devotion is ever ardent, as when the first wave of feeling spray-like broke into motion, and they knew that they loved.

"In the great Chief Justice, notwithstanding the noble qualities of the father, I think one may see indications that much of the character of the son came from the maternal side. In Carlyle's Life of Frederick the Great there are recorded many traits in Field Marshal Keith which are discernible in his American cousin. He is a soldier of fortune, and, like the expatriated Scottish gentlemen of that day, offers his sword wherever he may have honorable service. Frederick earnestly watches him while he is serving Russia, and concludes what he does is done in 'a solid, quietly eminent and valiant manner.' 'Sagacious, skilful, imperturbable, without fear and without noise, a man quietly ever ready.' Finally, nine years before our Chief Justice is born, his service with the Russians being ended, Frederick grasps eagerly at the Scottish soldier's offer to serve him. 'Well worth talking to, though left very dim to us in the books,' writes the same biographer, of a later time, 'is Marshal

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our institutions was right. Its majestic final jurisdiction, particularly to annul legislation not warranted by the Constitution, has been in truth as impressive to the political philosopher as beneficial to the great republic. This feature of our judicial system exercised not only by the Federal but by the State courts, with final appeal to the Supreme Court of the United States, was startling to the absolutism of the world. England's highest court of justice may not arrest the operation of an act of Parliament even though it be in violation of Magna Charta. "It was reserved," said Edward J. Phelps, "for the American Constitution to extend the judicial protection of personal rights not only against the rulers of the peo-

Keith, who has been growing gradually with the king and with everybody ever since he came to these parts in 1747. A man of Scotch type; the broad accent, with its sagacities, veracities, with its steadfastly fixed moderation, and its sly twinkles of defensive humor, is still audible to us through the foreign wrappages. Not given to talk, unless there is something to be said, but well capable of it then.' All through the wonderful pages of this story of the last of the great kings, this Scotch cousin of John Marshall is showing these Marshall traits. At the famed battle of Prag, fought May 6, 1757, which sounded through all the world, also commemorated in a composition alleged to be musical, with which vigorous pianists, mostly feminine, from that day to this have deafened mankind. At the glorious victory of Rossbach. At the siege of Olmutz. On the retreat to Koniggratz. At Breslau, and on the bloody day at Hochkirch, where, having saved the Prussian army, shot through the heart, 'Keith's fightings are suddenly all done.' 'In Hochkirch Church,' writes Carlyle, 'there is still a fine, modestly impressive Monument to Keith; modest Urn of black marble on a Pedestal of gray, and in gold letters an inscription,' in Latin, which 'goes through you like the clang of steel.' 'Frederick's sorrow over him is itself a monument. Twenty years after, Keith had from his Master a Statue, in Berlin, which still stands in the Wilhelm Platz there.'"

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ple, but against the representatives of the people." Mr. Jefferson and his followers were bitterly jealous of this power. Indeed it is stated by the most recent biographer of Jefferson, the brilliant and epigrammatic Thomas E. Watson, that to shake the authority of the Federal courts he adopted the plan of impeaching Associate Justice Chase. "The prosecution," said Mr. Watson, "failed miserably. Chase came forth in triumph. Henceforth John Marshall was safe." Aye, and the country was safe.

No thoughtful patriot can longer doubt that this great judicial power more than all other causes has contributed to establish justice, provide for the general welfare, and to secure the blessings of liberty to ourselves and our posterity. It has remained, however, for our own times to witness this great tribunal, with unshrinking courage and with immovable firmness, brand the condemnation of the Constitution, upon measure after measure, in decisions vital to the peace and happiness of the homogeneous Anglo-Saxon population of these southern States, decisions which have enabled us to rebuild our homes and reconsecrate our altars, to kindle the torch of education for the enlightenment of the minds of all the people, to add the superabounding products of our practically untouched resources of field, forest, and mine to the aggregate wealth of the nation, and so endear to the people the love of our common country, that in its recent need the veterans of Lee and Johnson, and the sons of their blood, flocked to the colors with a spontaneity and enthusiasm unsurpassed by the veterans of the Union or by the gallant youth of the north.

In a recent discourse upon the Supreme Court before the Virginia State Bar Association, the Hon. George F. Hoar, of Massachusetts, used the language following:

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"I have spoken in behalf of a tribunal whose judgments upon the greatest questions with which it has ever had to deal have overthrown, baffled and brought to naught the policy, in regard to the great matter of reconstruction, of the party to which I myself belong, and the school of politics in which I have trained."

The great Senator from New England, who I may say, as was true of Marshall, has been re-elected by an enlightened constituency which differs with him upon the most vital question of the day, and the future, was right. We who are often favored with diatribes against this great constitutional court should bear in mind that series of magnificent decisions, which, in spite of all the passions resulting from the mightiest and most furious civil war of which history gives an account, have speedily restored the southern States to that proud equality among their sisters which was contemplated by the framers of the Constitution. Nor should we fail to remember the freedom from partisanship exhibited by these rulings. In each case a majority of the court in political belief favored the object intended to be accomplished by the law which their decision annulled, and in each case nearly all of the judges had been appointed by a Republican President. In these decisions so essential to the harmony of the national life, it seems as if the genius of reunited America had breathed upon the sacred ashes of Marshall and evoked his benignant spirit that he might again meet his brethren in the consultation, again deliberate, again counsel, again decide.

We are not, however, to conclude that the mind of the great Chief Justice was absolutely colorless. Himself a soldier and patriot and also distinguished in political life, he could not divest his mind of an interest in public affairs,

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nor put behind him the opinions he had deliberately formed as to the best methods of government. As we have seen, he knew from bitter experience and observation the utter debility of a people without government, and openly declared that a government depending for its existence upon the varying and fluctuating action of distinct sovereignties could not be rescued from ignominy and contempt but by finding those sovereignties administered by men exempt from the passions incident to human nature. But there is nothing in all his career which betrays the slightest disregard for the rights of the States, or any interference with the principal essential of State existence, local self-government. His, indeed, might have been the famous exclamation of Chief Justice Chase, "the Constitution in all its provisions looks to an indestructible Union composed of indestructible States." In the famous debate in the Virginia Convention he had exclaimed: "I hope that no gentleman will think that a State will be called at the bar of a Federal court." This was done, however, before he was Chief Justice, in the case of Chisholm *v.* Georgia, but the Eleventh Amendment of the Constitution made it thereafter forever impossible. And yet he believed that the Constitution had been intended to create, and did create, a National Government, and so believing he saw a meaning in the instrument which made the great majority of his decisions accord with national principles of construction and policy.

How vastly these principles of constitutional construction have contributed to the power of the nation and the prosperity of the people is beyond the descriptive measure of human speech. The supremacy of the nation; its power to establish banks for the commerce of the people; its power to control the commerce with foreign nations

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and between the States upon principles of justice; to establish uniform rules of naturalization, and uniform laws on the subject of bankruptcy; to restrain unconstitutional powers attempted by States; to strike down the valueless State currency at times emitted; to uphold the obligations of contracts; to promote internal improvements,— these are but a few of the vital questions to which his judicial labors extended. The very structure in which we gather; its marble walls, its exquisite architecture, the radiant lights which here shine "o'er fair women and brave men;" the deep water-way from your city to the sea, the wharves thronging with ships bearing the flags of every nation, the mighty trans-continental railway lines, the probable Isthmian canal,— these things and multitudes like these, all contributory to the welfare of the people, we owe to the constructive genius, the massive mind, the immovable firmness, the abounding patriotism of John Marshall, and the great judges who thought with him.

I cannot further enlarge upon the great decisions of Marshall comprehended in thirty-four volumes of the reports of the Supreme Court of the United States, and familiar to every genuine student of our Constitution and our laws.

When old and worn, it is true that upon his venerable eyes fell the vision of that portentous cloud looking above the horizon, which was to bring in its wake the fiery storms of revolution, sweeping away millions of property and thousands of priceless lives, but around his dying head burned the glories of an imperishable past, lighting up monuments of judicial achievement, which saved the nation and will live while the nation lives.

It fell to his lot to survive most if not all of those mighty

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builders who had laid, and cemented with the blood of many, the foundations of American liberty, and who had constructed the shapeliest and strongest scheme for the government of freemen the world has ever known. His beloved commander, the idol of his heart, had been long sleeping in that spot on the romantic banks of the Potomac, then, now and forever to remain the shrine of a nation's love. The ashes of Alexander Hamilton "formed for all parts and in all alike shining variously great," for many years had reposed in an untimely grave. The mild and persuasive Madison, who nearly a half century gone, his colleague and joint laborer in the Virginia Convention to adopt the Constitution, penning with tremulous hand to the people whom he loved, his last pathetic warning against the dangers of nullification and disunion, had less than a year to live. John Adams, the fiery and incorruptible patriot, who had been rocked in every storm of the Revolution, and who declared in his old age that his gift of John Marshall to the people of the United States was the proudest act of his life, and Jefferson, the author of the Declaration of Independence, nine years gone, were both dead on Independence Day. Marshall was now nearly eighty years of age. The sweet Virginia maiden, who more than fifty years before had won the love of the affectionate, strong young soldier, coming from the war, the true and tender helpmeet in all the trials and anxieties of his wondrous career, she too, as he said, "a sainted spirit, had fled from the sufferings of life."

"The mossy marbles rest
On the lips that he has pressed
In their bloom;
And the names he loved to hear
Have been carved for many a year
On the tomb."

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Afflicted by the maladies common to extreme old age, the Chief Justice, who knew his Bible and loved his God, no doubt often dwelt upon the mournful majesty of the Psalmist when he exclaims:

"The days of our years are three-score years and ten; and if by reason of strength they be fourscore years, yet is their strength labor and sorrow."

So, with his mighty intellect unclouded to the last, on the 6th of July, 1835, about 6 o'clock in the evening, he calmly met the inevitable hour and passed away in peace.

Though dead, in the love and veneration of his country he lives, and shall live in glorious memory to the latest times; and on this day from the very flower of the country's purity and patriotism, from famous law schools and universities, from the noble profession of the law, from great cities and from hamlets, from the Supreme Courts of all the States and from the Supreme Court of the United States, from the President and from the Senate and House of Representatives, from the grateful hearts of nearly eighty millions of people, fervently come acclamations to the fame of this mighty patriot who taught to the people the imperishable truth so essential to our happiness and strength at home, and our strength and honor abroad; he best loves and serves his State who country loves and serves the best.

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STATE OF LOUISIANA.

Marshall day was impressively celebrated under the auspices of the Louisiana State Bar Association, at Tulane Hall, New Orleans, February 4, 1901, at 1:30 p. m. The hall had been fittingly decorated for the occasion. A large and distinguished audience of men and women was present, including the following:

Chief Justice Nicholls and Associate Justices Blanchard, Monroe and Breaux of the Supreme Court of Louisiana; Judges Pardee and Shelby of the United States Circuit Court; Judges Dufour, Moore and Beauregard of the State Court of Appeal; Judges Baker, Moise and Sommerville of the district courts; Harry H. Hall, the Dean of the Law School of Tulane University, who sat with the members of the senior class of the Law School, numbering seventy strong; Charles E. Fenner, former Justice of the Supreme Court of Louisiana; and the following members of the New Orleans bar: W. S. Benedict, Pierre Crabites, J. P. Baldwin, H. C. Cage, State Senator; D. B. Chaffee, Charles F. Claiborne, Joseph W. Carroll, John C. Clegg, F. D. Chretien, Charles P. Cocke, assistant United States District Attorney; John Dymond, Jr., B. R. Forman, William Grant, former United States District Attorney; B. F. Jonas, former United States Senator; T. J. Kernan, E. B. Kruttschnitt, Victor Leovy, C. T. Madison, E. T. Merrick, T. Marshall Miller, R. B. Montgomery, W. C. McLeod, Arthur McGuirk, James D. Nix, Porter Parker, W. S. Parkerson, L. C. Quintero, F. E. Rainold,

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Frank L. Richardson, E. D. Saunders, W. B. Spencer, D. M. Sholars, W. J. Waguespack, E. J. Wenck, and a large number of lawyers newly admitted to the bar. Of the general public who were present, Dr. Edwin A. Alderman, the President of the Tulane University, was an attentive listener, as was also Thomas McC. Hyman, the clerk of the Supreme Court.

The meeting was presided over by Henry P. Dart, President of the Louisiana Bar Association. In introducing Joseph P. Blair as the orator of the day, Mr. Dart said:

Introductory Address of Henry P. Dart.

We are gathered that we may be in line with the lawyers of the United States and others who this day are celebrating the one hundredth anniversary of the accession of John Marshall to the Supreme Bench of the United States. He was the expounder, almost the creator, of the system of government which under his inspiration has expanded in power and might and influence. To him more than to any single man of his period is to be attributed that centralization of the government of the United States which confessedly is its predominant principle to-day. His position was such and the times were such that he is entitled to the credit of laying the foundations of the principle in the early jurisprudence of the country, and before faction had arisen and before section arrayed itself against section.

John Marshall represented the theory of nationality, and his position and the situation of affairs gave him the opportunity to construe the Constitution of the United States in such manner that in times thereafter the gen-

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eral principle was accepted and enforced to its last degree; whether it was better for the country or worse has passed beyond our faculty of judging, but it is well for us as men and as lawyers and as judges to understand those principles and to express ourselves upon them.

There was a time, I doubt not, when the celebration we are now participating in could not have been held with any general enthusiasm south of Mason and Dixon's line; but we are now at one with the lawyers of the United States in recognizing the greatness of John Marshall, and to illustrate his character and to expound his doctrines will be the natural course of things to-day all over the country in meetings of this character.

The chairman of the national committee sends us a telegram from Chicago, which I will read: "Illinois sends greeting to Louisiana; the American bench and bar are united in one common brotherhood on this historic day."

The only duty devolving upon me is to introduce the orator of the day, who is well known to you, and I take great pleasure in presenting Mr. Joseph P. Blair.

Oration of Joseph P. Blair.

On the 17th day of September, 1887, the people of this country observed with fitting ceremony the centenary of the framing and promulgation of the Constitution of the United States. The 4th day of February, 1890, witnessed the centennial celebration of the organization of the Supreme Court of the United States. It is eminently appropriate that these two centenaries should be followed by a commemoration of the one hundredth anniversary of the day when John Marshall took his seat as Chief Justice of the Supreme Court of the United States. For with the Constitution and the Supreme Court of the Na-

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tion, the name and fame of John Marshall are imperishably connected.

We have come to regard our great organic law as the most perfect written instrument of government the mind of man has ever devised. And among the institutions it called into being, none has fulfilled more perfectly the important purposes of its creation than that most august of judicial tribunals, the Supreme Court of the United States. It is Marshall's just title to rank among the great men of this Nation that he contributed more than any one man to make the experiment of the Constitution a glorious success, and that he rescued the Supreme Court from an uncertain fate, and first demonstrated its ability to perform its designed and indispensable rôle in the scheme of our national life.

The name of John Marshall recalls to all of us at once the great American judge who reigned, as it were, for thirty-four years over one of the three co-ordinate branches of the national government, and to many it recalls little else. The varied achievements of his strenuous life before he entered upon his judicial career, the distinguished services he rendered his State and the Nation as soldier, patriot, lawmaker, statesman and diplomat, are remembered by few. And not all, I fear, even of his profession, have an accurate knowledge or adequate appreciation of the part his work as a judge played in the making of the Nation.

I hope, therefore, it may interest you to have presented on this occasion a brief sketch of Marshall's life before he began his judicial service, and I am sure that not even an imperfect presentation of the subject can make uninteresting or unprofitable a consideration of what the Constitution, the Supreme Court and the Nation owe to the

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greatest of American judges, the fountain head of the constitutional law of this country.

After giving such an outline, the orator proceeded:

This necessarily brief view of Marshall's life before he reached his appropriate place at the head of the Federal judiciary, a period of his life which has been eclipsed by the overshadowing greatness of his later achievements, will, I believe, help us to understand his wonderful career as Chief Justice. For if, as we must believe, there is a Providence which concerns itself with the affairs of men, then, for the quarter of a century which had intervened since at the age of twenty he volunteered as a soldier of the Revolution, Marshall had been receiving a most perfect schooling for the stupendous task which was yet before him.

His career as a soldier, bringing him in contact with men from different States, animated by the same spirit of resistance to a common enemy, threatened by the same perils and striving for the same goal, accustomed him, as he himself says, to the idea of a common country and a common government, co-extensive with the territory of the several States, and broadened his sympathies and interests beyond the confines of his State, thus emancipating his mind from the provincial spirit of the times and preparing him for broad and national views on questions of common concern. His work as a lawyer gave him the essential professional training and knowledge. His active participancy in the political contests which preceded and followed the adoption of the Federal Constitution gave him a thorough knowledge of the defects of the old Articles of Confederation, of the governmental powers necessary to secure a more perfect union, and of the

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dangers to be apprehended from State pride and jealousy and interstate distrust and conflict of interest — a knowledge indispensable to the destined expounder of the powers of the Nation and the future arbiter between it and the States. His public services as a legislator and cabinet minister and diplomat gave him a knowledge of affairs and of the practical workings of government — an invaluable training for the determination of the great public questions which are included within the jurisdiction of the Supreme Court of the United States.

Add to this preparation a profound intellect, unequaled reasoning powers and never-failing common sense, with an unexampled gift of clear, luminous expression, and we can appreciate somewhat the qualifications of the man for the position he was about to fill.

Let me dwell for a moment upon the nature of the task and the attendant duties and responsibilities which confronted Marshall, when, on February 4, 1801, one hundred years ago to-day, he took his seat as Chief Justice of the Supreme Court of the United States. And then let us consider how he had performed his task and what he had done for the Court, the Constitution and the Nation, when, after thirty-four years of judicial labor, he was summoned from the bench to appear before the bar of the Supreme Judge of all.

First, as to the nature and functions of the great tribunal over which Marshall was called to preside. The Supreme Court of the United States has been often declared to be at once the most original and the most successful of the institutions created by the Constitution, to represent the flower of the wisdom of the framers of that great instrument — tributes it deserved and received only after Marshall had demonstrated its ability to perform

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the novel and difficult part devolving upon it under the organic law.

I shall not speak of its ordinary judicial functions, important and extensive though they be. It suffices to say that its ordinary appellate jurisdiction brings before it for review perhaps a greater variety of cases depending upon a greater number of different systems of laws than falls within the cognizance of any other court in the world. I desire to refer to some of the unique and vastly more important functions which were confided to the Supreme Court by reason of our peculiar system of government, its dual nature and written Constitution. For it was in the exercise of its unexampled powers as the final interpreter of the Constitution and the final arbiter between the Nation and the sovereign States that the most characteristic and enduring work of the court, under Marshall, was performed, and it was in this field of jurisdiction that the talents of Marshall were most signally displayed.

As we all know, the prime object had in view by the framers of the Constitution was to leave unimpaired the power of the States to control all matters of local interest, and to create a new government for matters of general national concern. Hence there were conferred upon the National Government certain enumerated powers, as, for instance, the exclusive charge of our foreign relations, with power to declare war, make peace, and negotiate treaties, the duty to guarantee to each State a republican form of government and to secure freedom of intercourse between the States, the regulation of commerce, the establishment of a common currency, and such other matters as concerned all the States and the people. The grant of these powers to the General Gov-

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ernment involved so many limitations upon the powers of the States, whose range of action was further restrained by certain express prohibitions, as for instance that no State shall coin money or emit bills of credit or pass any *ex post facto* law or law impairing the obligation of contracts. All powers not thus expressly or impliedly taken from the States continued to be vested in those sovereign communities. The form of national government planned in the Constitution was one of the first perfect types of the now familiar division of the powers of government among three distinct and independent departments,— the executive, legislative, and judicial. The Constitution, in remarkably brief and simple language, defined the sphere and enumerated the powers of each of these co-ordinate departments.

Such, briefly outlined, was the complicated system of government which was in its experimental and plastic stage when Marshall was placed at the head of the judicial department. There were the national sovereignty and the sovereign States each governing at the same time over the same territory and the same people; and the National Government was subdivided into three independent departments, each with its exclusive domain of activity, and each intended as a check and balance on the others. And over all was a written Constitution, prescribing in necessarily general language the powers and functions of each of the component parts of the system. All depended upon harmonious action. Conflict and disaster would result if the different parts of the system failed to keep within their respective spheres of action, if one invaded the domain of another.

But who was to interpret and construe with final authority the organic law, enforce obedience to its man-

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dates, and respect for its limitations, and determine disputes between such mighty contestants? Who was to prevent executive usurpation or legislative encroachment? Who was to protect the States from an invasion by the central government into the domain reserved to them? Who was to check aggression by the powerful and jealous sovereign States upon the powers granted to the infant Nation?

This delicate and difficult rôle fell to the Supreme Court of the United States. It was to be the final interpreter of the Constitution, the arbiter between the Nation and the States, the check upon all, the regulator of the system, acting as the force of gravity in the solar system to keep each member of our governmental system moving within its constitutional orbit. Truly it has been said that the Supreme Court was without a prototype in history. Its powers were unexampled, whether we consider the novelty of their character, the difficulties involved in their exercise, or the tremendous responsibilities which they entailed.

Familiar as we now are with the working of the constitutional machinery of the United States, it is easy for us to underestimate the tremendous task which devolved upon a tribunal charged with such unique functions. But it would be difficult to overestimate the magnitude of the services and the transcendent abilities of the man under whose guidance the court first showed itself competent for the task, who, with no precedents to guide him, first blazed out the path and laid down the great rules and principles under which the court was able to perform, with perfect success, all its novel and difficult duties during the critical and formative period of the national life. And that man was Marshall.

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It is true that the Supreme Court had been in existence for eleven years when Marshall was appointed Chief Justice, but it did not spring Minerva-like into fully developed power and dignity. Its earlier years were not years of important achievement or brilliant promise.

At its first session it had no cases. At the date of Marshall's appointment there were only ten cases on its docket. From 1790 to 1800 there were decided only six cases in which the Constitution was construed. The most important constitutional question decided during that period arose in the celebrated case of Chisholm against the State of Georgia, in which it was held that under the Constitution the States had lost that common attribute of sovereignty — exemption from suit by a private citizen. This interpretation of the Constitution was received with surprise by the country at large, and with consternation by the debtor States. It is one of perhaps two decisions of the Supreme Court on important constitutional questions which did not at once, or in time, command approval and general acquiescence — the other is known as the Dred Scott decision. The case of Chisholm *v.* Georgia was practically repealed by an amendment to the Constitution. From the Dred Scott decision the appeal was to the wager of battle, and it was wiped out in the blood of civil war.

Prior to Marshall's becoming a member of the Supreme Court, the vast extent and importance of its duties and powers were dimly understood, and few suspected what a potent factor it was destined to become in the development of the Nation. The esteem in which it was held may be inferred from the fact that one of its members resigned to accept the office of chancellor in his own State, a seat on its bench was declined about the same

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time in favor of a State judgeship, Chief Justice Jay resigned his office to accept the governorship of New York, and both Jay and Ellsworth considered the duties of Chief Justice not to be incompatible with the holding of other offices at the same time. How far the court was from the assured and exalted position it was soon to attain under its greatest Chief Justice is revealed by Jay, who, on the resignation of Ellsworth, was tendered, for the second time, the position of Chief Justice. In declining a second appointment he said: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which was essential to its affording due support to the National Government; nor acquire the public confidence and respect which, as the last resort of the justice of the Nation, it should possess. Hence I am induced to doubt both the propriety and expediency of my returning to the bench under the present system."

Such was the Supreme Court when Marshall took his place at its head. He at once lifted it to such a position of power and influence in the government that an enraged Executive, a hostile Congress, and the dominant political party of the country strove against it in vain. The manner in which it solved the momentous questions which came before it soon excited the wonder and the admiration of the world, and foreign jurists and writers began to refer to it as the most august of all known tribunals. And when death brought to a close the illustrious career of Marshall, the Supreme Court had already come to be regarded as the preserver of the Union, the bulwark of the Constitution, as well as its most perfect creation.

There is no danger of an overestimate of Marshall's

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part in the work of the court while he was a member — a period which has ever since been regarded as the golden age of the Supreme Court. No member of the bench has ever had over the others the great and predominant influence which Marshall exercised over his associates. There were practically no dissents in his day on great constitutional questions. He was generally the organ of the court in deciding them. Of the twenty-five cases reported in the first volume of Cranch's Reports, all but one were written by him. His learned associate on the bench, Mr. Justice Story, speaks of Marshall's great decisions as "the fruits of his unassisted meditations;" and the bench and bar of this country have always recognized as Marshall's work the great fundamental principles of constitutional law which were laid down during the time of his judicial service.

The limits of an address on an occasion like this forbid even the briefest summary of the great decisions of Marshall, which contributed as much to the success of the Union as all the acts of Congresses and Presidents who came and passed away during the course of his long judicial career. But a few illustrative examples may be glanced at, not only for the purpose of noting the nature and importance of the questions decided, but to see with what illuminating and convincing and unanswerable reasoning his conclusions are always supported.

One of the earliest cases decided by Marshall — Marbury *v.* Madison — involved a conflict between the Constitution and an act of Congress, and, for the first time, the question was squarely presented, and had to be definitely determined — what was to be done with an unconstitutional law. Did the court have power to annul an act of Congress, by ignoring or refusing to give it any force and

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effect, when violative of the Constitution as construed by the court, or did Congress, as one of the co-ordinate branches of the government, have power to construe the Constitution finally for itself? The decision was that the provisions of the Constitution imposed absolute limitations upon the legislative powers, and that an act of Congress in conflict therewith was an absolute nullity.

The Constitution did not expressly confer upon the Supreme Court the power thus to declare null an act of Congress, one of the co-ordinate branches of the government. If the power existed, which was much doubted at the time, it was an unique power, one that had never been possessed or exercised by the courts of any other country—certainly not in England, the country from which, at that time, had come our laws, our legal traditions and our conceptions of the judicial power. But after the decision in Marbury *v.* Madison, the existence of the power and the propriety of its exercise were never afterwards seriously questioned. This was so, not because the Supreme Court had so decided, but because Marshall, in announcing the conclusion of the court, had demonstrated, by reasoning at once easily understood and unanswerable, that the power must exist else the Constitution was not worth the paper it was written on, and the experiment of a central government of limited powers was a certain failure.

He made it clear that the question really was whether the Constitution was to control Congress or Congress the Constitution. The government of the United States is one of enumerated powers, and the powers of the legislative department are defined and limited in the Constitution. To what purpose, he said, are these limitations reduced to writing, if they may at any time be disregarded by those intended to be restrained? Either the Consti-

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tution controls any legislative act repugnant to it, or the Legislature may alter the Constitution by legislative act. Between these two propositions there is no middle ground. If the first be true, then a legislative act contrary to the Constitution is not law; if the other be true, then written constitutions are absurd attempts on the part of the people to limit a power in its nature illimitable.

The decision was of far-reaching importance and lies at the foundation of our constitutional jurisprudence. It raised the Supreme Court at once to a position of the highest dignity and power; it settled that the Congress of the United States could not aspire to the omnipotence of the English Parliament; and it gave notice to the other co-ordinate branches of the government that the Supreme Court possessed and would exercise the power to enforce, even against them, the supremacy of the Constitution.

In discussing other questions involved, Marshall defined the proper relations between the judicial and executive departments of the National Government and the conditions under which the court should undertake to review or control the action of the other departments, and in this important respect also the decision has ever since been a guiding precedent not only in the Federal but in the State courts.

Another constitutional question of supreme importance decided and settled by Marshall for all time was the appellate jurisdiction of the Supreme Court of the United States over the decisions of the highest court of a State in certain cases arising under the Constitution and laws of the United States.

The existence of such a supervisory power over the

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courts of a sovereign State was strenuously and indignantly denied and denounced by the Supreme Courts of several States and by the leaders of the then dominant political party, who thought they saw in the asserted jurisdiction a dangerous centralization of the judicial power and the destruction of the independence of the State courts.

In the first case in which the question was presented, the decision, rendered by Judge Story, was not accepted as conclusive. It was presented again in an appeal from the Supreme Court of Virginia (Cohens *v.* Virginia). Marshall then addressed himself to the discussion of the question, and, as was usually the case when he discussed a constitutional question, he exhausted it. So inexorable was his logic, so convincing his reasoning, that the questioned power passed at once into the category of unquestioned powers, where it has ever since remained.

Here, as in other cases, Marshall did not simply announce a conclusion, but he demonstrated that the decision was right; that the jurisdiction attacked not only existed, but was essential to the existence of a supreme organic law for the whole country.

Here then was established, explained and justified one of the most important functions of the Supreme Court, that of final interpreter of the Constitution; and there was thus insured that uniformity of construction essential to the supremacy of the Constitution.

Among the most important services of Marshall are the rules and principles of constitutional construction which he thought out and formulated and which are interspersed among his decisions. They have been so universally accepted and so often applied, that, as was said by the late Chief Justice Waite, they have come to be re-

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garded almost as parts of the Constitution itself. And it is in a large measure due to them that our Constitution has been found to possess that flexibility and elasticity which were supposed to be incompatible with a written Constitution and without which it could not have met the requirements of the United States in all the various stages of their marvelous growth and development during the century just closed.

It is in one of Marshall's opinions that we find the first judicial exposition of the nature and importance of the commerce clause of the Constitution, which, developed along the lines marked out by him, has emancipated the commerce of the Nation from the control of the States, and, by obliterating State boundaries, has rendered possible the vast growth and development of the internal commerce of this country.

In another of his opinions we find the first and best definition of "bills of credit" within the meaning of the constitutional prohibition against the issuance by a State of bills of credit. In the famous Dartmouth College case, Marshall construed and applied the contract clause of the Constitution, which forbids a State from passing any law impairing the obligations of a contract. The decision is said by the late Justice Miller to have exercised a more pervading and controlling influence over State legislation than any other ever rendered by any court.

Perhaps no decision of Marshall was of more transcendent importance than that rendered in the case of McCulloch against the State of Maryland. It is one of the cases of which it may be said that the fate of the Nation hung upon the decision of the court. In this case Marshall dealt with the implied powers of the National

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Government, and the opinion is considered one of the most masterly and elaborate of his efforts.

It was well said at the time by William Pinkney that this decision contained a pledge of the immortality of the Union.

Time does not permit the mention even of other famous decisions in which the fundamental principles of American constitutional law were established by Marshall on lines so broad and deep that they are now the basic stones upon which rest the magnificent superstructure of our constitutional jurisprudence. Very few of the fundamental conceptions we have of the nature and powers of the Federal Government and of the relations of the component parts of our dual system to each other were not first expounded, explained and defended by Marshall.

Marshall's demeanor and conduct on the bench seem to have left nothing to be desired. He was simple and unaffected in his manners; uniformly courteous and most patient; firm when necessary and always dignified without effort; and possessed of a judicial courage which led him, on more than one occasion, notably at the trial of Aaron Burr, to face without flinching an indignant nation and a popular clamor which threatened to overwhelm him for ever with undeserved obloquy.

His opinions are not characterized by a display of great technical learning or legal scholarship, but rather by the higher qualities of an unrivaled grasp of general principles and the ability to apply them with unfailing wisdom and common sense to the question before him, and to reach the conclusion by reasoning so clearly expressed and so logical that the result always seems to be inevitable and unquestionably correct. He rarely cited authori-

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ties and never massed them. In this respect only his influence upon his successors does not seem to have been of an enduring character. His decisions thus contrast strikingly with those of more recent date where the scales of justice are employed in weighing authorities *en masse*, and the reasoning of the court is with difficulty traced through a bewildering maze of precedents.

Marshall's services to the Supreme Court and the Constitution, which I have briefly and imperfectly touched upon, had an effect upon the character of the Federal Government and the history of the country that would be difficult to overestimate. He was placed at the head of the judicial department at a most critical period, and fortunate indeed it was for the young nation that he was permitted for so many years to perform, with unimpaired vigor, the duties of that office.

Adams' appointment of Marshall to the Chief Justiceship has been aptly referred to as a gift or legacy of the dying Federalists to the victorious Republicans—a bequest destined to prove fatal to the policies of the new party, but a bulwark and protector to the National Government at the time of its greatest peril. About the date of his appointment the party of the Federalists, under whose fostering care the new government had begun its career, had been defeated at the polls by the Republicans, the party of Jefferson, the party of the strict constructionists, whose feelings at that time towards the infant nation may be likened to those generally attributed to a step-parent, who reflected the jealous hostility of the States, and whose general policy was to restrict the powers and functions of the central government within the narrowest limits, preferring the evils of a weak confederation rather

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than the risk of a government strong enough to overshadow or oppress the States. Viewing the National Government somewhat in the light of a necessary evil whose growth and development was fraught with danger to the States, their cardinal rule of construction for the Constitution was to deny to the central government every power not conferred expressly or by absolutely necessary implication, and to contract by construction every granted power within its narrowest limits. Had the National Government, at that plastic stage of its life, received the full impress of the views and policies of the Republican party, it is more than probable that the evils and the breakdown of the old Articles of Confederation would have been repeated, or if the Union had survived to this time, instead of the great world power the United States has come to be to-day, we would have a loose-jointed alliance or confederation, existing by the sufferance of the States, beneath the dignity and wanting the powers of a Nation.

I do not believe I am guilty of any extravagance of statement when I say that this country was saved from such a fate by John Marshall. For thirty-four years at the head of the Federal judiciary this one man exercised an influence upon the character of the National Government and the lines and direction of its growth and development as great as that of the executive and legislative departments combined; and, as is said by a recent historian,[1] Marshall, in the course of his long judicial career, rooted out Jefferson's system of polity more effectually than all the Presidents and Congresses that ever existed. He found for the central government in the Constitution all the powers necessary to make it complete and inde-

[1] Henry Adams.

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pendent within its constitutional domain, and, what was more important, he was able so to explain, defend and justify the existence of such powers as to commend them to the people of this country — the ultimate source of all power, State or Federal.

It would be interesting, if time permitted, to trace further the antagonism between Marshall and the Jeffersonian party, and to show that one who for a long period of time construes the laws of a country wields a greater influence than they who make or execute the laws. It must suffice to say that Marshall and Jefferson represented two opposing forces, and that upon the balance struck by the antagonism of these forces the success and stability of our dual system of government depends. One was imbued with the necessity of a strong central government, supreme in its sphere; the other was equally solicitous for the maintenance of the powers and independence of the States. Their equal claims to be honored for their patriotism and public services is shown by the recent verdict of the distinguished jury of scholars, statesmen and jurists, who gave them both high places in the Hall of Fame, Marshall receiving ninety-one and Jefferson ninety votes. Thus the close rivalry which existed during their life-time has continued unto the third and fourth generation.

In private life Marshall's character was without stain or blemish. His biographer has no acts to apologize for, no faults to explain away.

As a lawyer he stands at the head of his profession in this country. As a judge his illustrious career has no parallel in the judicial annals of the world. He is not only the greatest of all the great men who have sat on

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the bench of the Supreme Court, but it may be truly said that he arrested that court on the road to failure and saved it from being classed among the disappointments and miscarriages of the Constitution.

That this country has been blessed with the most perfect written instrument of government the mind of man has ever devised is due not solely to the members of the convention which framed it, but in a great measure to Marshall. As expounded and interpreted by him, it became a grander and more perfect instrument than it was even in the conception of its framers. "He found the Constitution paper, and he made it power; he found it a skeleton, and clothed it with flesh and blood." That the United States have become a great nation, foremost among the world powers of to-day, capable of arousing and worthy to be the object of those feelings of loyalty and patriotism without which a Nation cannot endure, and which frequent change of residence prevents the majority of the people of this country from feeling for any of the States, is due to the possession by the United States of the powers which Marshall expounded, defended and justified when the National Government was struggling for existence. Among the great nation-makers who were his contemporaries, in the long line of illustrious men who have since left their mark upon the history of this country, we shall search in vain for any, save Washington, whose public services were greater or more enduring than those of the man in whose honor we have assembled to-day.

I have said that Marshall entered upon his life work, one hundred years ago, at a critical period in the national life. The crisis at that time was due to the weakness of

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the National Government, then in its infancy, an untried experiment with no precedent in history to give promise of success.

The beginning of a new century finds the United States at another critical period of their existence. The crisis now is due to the greatness, not the weakness, of the Nation. The problems and difficulties which confront it are those consequent upon the vast expansion of its powers and its boundless wealth, to its vigorous youth and conscious strength. It has grown too great for its activities to be confined within the limits even of the imperial domain on this continent, extending from ocean to ocean, over which it has expanded. Neither the conduct of the vast internal commerce nor the development of the exhaustless resources of the country suffices to satisfy the overflowing energies or furnish employment for the ever-increasing wealth of its people. We have naturally and inevitably expanded into other fields of activity. We have entered into competition with the world for the commerce of the world, and have sought employment for our surplus capital and energy in the development of the undeveloped resources of less progressive countries.

In these days of strenuous world-wide activity, when improved methods of communication have brought into close touch all parts of the earth, causing the most distant countries to have more points of contact, more common and conflicting interests than had bordering States a hundred years ago, the nations of the earth must be regarded as members of one great community, their fields of action crossing each other in so many lines, giving rise to so many matters of common concern, that no nation can any longer lead an isolated existence, indifferent to the external relations of other nations, exerting no influ-

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ence and prepared to take no part in the common affairs of the world. Certainly the nation which is generally considered to be the most powerful and the most progressive, the greatest in wealth and resources, in youth and energy, cannot expect and should not desire to play such a passive and ignoble rôle in the community of which it must needs always be a deeply interested member.

And so it has come about, naturally, properly, inevitably, that the United States, having become a great nation, have become also a great world power, with duties and responsibilities to face and interests to further and protect which were not foreseen by the most prescient a century ago, and were not dreamt of by the framers of the Constitution, but which cannot, for that reason, be shirked or evaded, unless we are prepared to call a halt in the growth and development of this country, a halt which may be the precursor of contracting powers and the beginning of the evils which come to a country when growth and development cease and stagnation sets in. But be that as it may, it is the part of wisdom to recognize the fact that such a halt will not be called by the people of this country. As a great statesmen recently said, the country will never be the same again. For weal or woe, we have passed irrevocably beyond the old lines. It should now be the common concern of all that neither the Constitution nor the National Government proves unequal to the inevitable task before them.

These new conditions under which we begin the new century, the enlarged sphere of our national activity, which recent events have brought home to us with startling force, have already given rise to constitutional questions and difficulties of the gravest importance and utmost perplexity, as potent for good or evil as any in the

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past history of the country. History repeats itself. The strict constructionists who, in Marshall's day, denied the existence under the Constitution of the powers upon which we now know the success of the Union depended, are again making themselves heard in the land denying the existence under the Constitution of powers which are essential not only to the further progress of the Nation in the direction where its great destiny lies, but for the preservation of that which it has already achieved, and insisting upon a construction of the Constitution which will handicap and cripple the United States as a member of the community of sovereign nations.

On the other hand, there are those who now seem impatient of any organic limitations upon the powers of the Federal Government in respect to its foreign relations or colonial possessions and answer adverse criticism of our international policy by appeal to unreasoning patriotism, decrying all opposition on the specious and dangerous plea that we must always present a united front in our external relations, and that party divisions on such questions will weaken the nation in the eyes of the world.

It is fortunate that, at this critical period, the bench and the bar of this country, and the great institutions of learning, the leaders of thought in every State of the Union, have by common consent turned aside for a day from their ordinary avocations to contemplate the public services of John Marshall. For there can be no better preparation for the solution of the momentous questions before us than a study of the life work of the great expounder of the Constitution. We shall thus strengthen and renew our allegiance to a Constitution under which the liberties and happiness of the people have been secure, while the United States have gone forward along

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the road to national greatness with surer and more rapid strides than any other of the nations of the world. Its mandates and its limitations will not be disregarded or found irksome by one who has learned their meaning and the reasons for their existence from the decisions of Marshall. But we may learn from him another timely lesson, one that the strict constructionists and little Americans of the day should take to heart, and that is that our great organic law is not a dead but a living instrument, not rigid and inflexible, but capable of growth and expansion, not made for one time and one set of conditions, but for all times and to meet all the needs and exigencies of all the stages in the growth of a nation completely and absolutely sovereign within the sphere of its action. For thus regarded and construed, our Constitution will not be found, for the first time, to be a bar and an impediment to the growth and progress, to the success and greatness, of the United States.

If, as I believe, the teachings of Marshall, the character he gave the Constitution and the principles of construction he established shall tide us over the present constitutional crisis, and secure for the United States, under the Constitution, the powers necessary to enable them to maintain the proud and commanding position so promptly accorded them on their first appearance among the great world powers, then a crowning glory will be added to the already imperishable renown of the great American judge.

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STATE OF FLORIDA.

Marshall Day was celebrated in Florida under the auspices of the Jacksonville Bar Association at a dinner given at the St. James Hotel in Jacksonville. Among the members and guests present were the following: President A. W. Cockrell, Jr.; guests of honor: Hon. W. S. Jennings, Governor of the State; Attorney-General W. B. Lamar, Judge W. H. Arnoux of New York, G. W. Wilson and W. R. Carter, Dell Cassidey, Clerk of Circuit Court; Hon. C. M. Cooper, Circuit Judge R. M. Call, United States District Judge J. W. Locke, Judge John L. Doggett of the Criminal Court of Record, Ex-Governor F. P. Fleming, C. D. Rinehart, W. H. Baker, Alex. St. Clair-Abrams, County Judge H. B. Philips, Charles L. Fildes, W. B. Clarkson, W. B. Young, H. E. Bowden, D. C. Campbell, S. G. Shaylor, A. B. Humphries, A. G. Hartridge, Colonel H. Bisbee, H. H. Buckman, Seton Fleming, J. M. Barrs, W. J. Bryan, N. P. Bryan, George C. Bedell, W. P. Smith, H. L. Montgomery, Geo. M. Powell, F. P. Fleming, Jr., J. S. Maxwell, Frank O. Clark, C. H. Summers, E. O. Locke, C. S. Adams, A. H. King, M. A. Brown, D. U. Fletcher.

At the great fire in Jacksonville, which occurred in May, 1901, all the papers of the Jacksonville Bar Association were destroyed, including the manuscript of the addresses. From a contemporary account we are able to give a synopsis of the proceedings and addresses.

The meeting was presided over by A. W. Cockrell, Jr.,

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President of the Association, who, after reading congratulatory dispatches from the National Committee on Marshall Day and from Adolph Moses, sending the greetings of Illinois to Florida, then introduced Governor Jennings. After some fitting remarks by Governor Jennings the chairman introduced as the orator of the day C. M. Cooper, formerly a member of Congress and Ex-Attorney-General of the State, from whose address the following is taken:

Address of C. M. Cooper.

We have met to-night to do honor to the memory of a great man and a great judge. The greatest of American judges, like the greatest of American Presidents, was born of poor parentage. He was fond of reading, and had at his elbow the best books of the English authors which were to be found in the old homes of Virginia. He had no collegiate education, but the sentiment is as true now as it was when Carlyle said: "The best college is a fine collection of books."

After reviewing the history of Marshall and his judicial career and leading decisions, Mr. Cooper continued:

To form an adequate estimate of John Marshall we must consider, first, the conditions of the field to which he was called; second, the man; and third, his work.

First, let us take the conditions which existed when he was appointed. Independence had been achieved, the Constitution had been adopted, and the government of the United States thereunder had begun.

Some Revolutionary patriots, such as Patrick Henry and George Mason, had opposed the adoption of the Constitution. Many others, of whom Madison, who had been es-

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pecially prominent and influential in securing its formation and adoption, may be considered a representative, had become fearful of what they considered a too free construction of its provisions as dangerous to the rights of the States, local self-government and individual liberty.

The contentions of the schools of construction of Hamilton and Jefferson were strenuous and bitter. None of the greatest constitutional questions had been decided by the Supreme Court. Oliver Ellsworth had resigned the Chief Justiceship. John Jay had declined a reappointment, saying: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which were essential to its affording due support to the National Government; nor acquire the public confidence and respect which, as the last resort of the justice of the Nation, it should possess."

This declaration of Jay and the position of authority to which the court had attained, and the work that it had done in a few years later under the Chief Justiceship of Marshall, is a measure of his greatness.

Second — The man. His birth and education; life and offices prior to his appointment as Chief Justice, his mental characteristics and his qualities as a judge.

Mr. Cooper then elaborated all of these points, going deeply into Marshall's character. Mr. Cooper was thoroughly informed on the history of Marshall's life, and this part of his oration was very full and interesting.

The third head of the oration was his Work. Among other things Mr. Cooper said: His judicial opinions established the authority of the Supreme Court, its right to declare acts of Congress and of State legislatures unconstitutional, in pursuance of what has been called the American Discovery in the Science of Government. He

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gave opinions favorable to the powers of general government, opinions favorable to the reserved rights of States, opinions which have been of inestimable value to the security of person and of property of individuals.

We may not all agree with all of his views or opinions, but we do all agree as to the greatness and integrity of the man and the judge.

Although all that was mortal of the man has long been dust, the principles of constitutional law which he declared and established still govern a great nation of multiplied millions, and their influences do but broaden with the lapse of years.

Address of Horatio Bisbee.

Mr. Cooper's address was followed by one delivered by Horatio Bisbee, who, after an extended reference to Marshall's life and to his leading decisions, continued:

These three cases — Martin *v.* Hunter's Lessee, Cohens *v.* Virginia, and Dartmouth College *v.* Woodward — established forever in this country the stability of contracts; that no right of the citizen under a contract can be taken away by a State legislature; that, by the Constitution, the people created a nation; that such nation was sovereign against all assaults by a State or combination of States; and, at the same time, and by the same great judgments, it was established that each State has such sovereignty as the Constitution of the United States has left it.

We, as lawyers and judges, apply or misapply those great doctrines every day. After the lapse of nearly a century they appear simple and plain. They have become elementary law. Yet they arose from and survived one of the fiercest and bitterest and most protracted political contests that was ever waged in this country. It

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was a fight between Federalism on the one hand and State Sovereign Democracy on the other, and the former won. That battle was won by the marvelous powers of John Marshall in argument, lucidity of expression, in strength of logic and mathematical demonstration that has never yet been equaled.

I have often, in the calm and quiet of my office, when reading his matchless opinions, silently thanked God for creating the man, and President John Adams for the wisdom of his appointment. Then sectionalism was not known. The Commonwealth of Massachusetts and the Old Dominion of Virginia were united in a common cause. As they had before stood shoulder to shoulder to break the chains forged by the crown of England, so then they stood hand in hand to create, maintain and perpetuate a sovereign union of States to bless mankind forever.

Washington, Marshall and Lincoln are the three matchless figures that, above all others, stand out in bold relief against the background of this republic. Had no monument of bronze or marble ever been erected to perpetuate the memory of their heroic deeds and public services, there has been erected in the hearts of a grateful people a monument to their memories more enduring than marble and loftier than the skies. To compare either of them to the other would be invidious and unpatriotic. Each stands incomparable in his own sphere, and beyond the reach of malice or of envy. To each the language of Hamlet, when picturing the character of his father to his recreant mother, would (omitting two words) be appropriate:

"See, what a grace was seated on his brow . . . the front of Jove himself. An eye like Mars, to threaten and command. A station like the herald Mercury, new-

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lighted on a heaven-kissing hill. A combination and a form, indeed, where every god did seem to set his seal, to give the world assurance of a man."

Such was Washington; such was Marshall; such was Lincoln.

Washington by his military achievements, his indomitable will and unconquerable perseverance against obstacles that would have crushed smaller souls, gave liberty to our country, and made possible our written Constitution of Government.

From every grant of power in that instrument, Marshall wrote out a chart of constitutional law for all future time.

Lincoln followed that chart, and by following it preserved a nation, and perpetuated its glory.

As the result of such achievements we have to-day, thank God, seventy-five millions of people, united and happy, each part of our common country vying with the other in patriotic ardor, both in peace and war, and the Commonwealth of Massachusetts and the old Dominion of Virginia again bearing aloft the Stars and Stripes as of old, the emblem of our country's power wherever it floats.

But as generations come and go, as centuries, may we hope, with the Union still preserved, roll on; when hundreds of millions of people shall mark our progress; with a gigantic commerce outstripping all competitors; with uncon¡uerable armies at home, and unconquerable navies upon every sea and in every clime; with an invincible people behind them all, confronting the world, the student of history will trace back this grand and marvelous stream of national life and national power to the brain and courage of John Marshall.

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STATE OF MICHIGAN.

Marshall Day was elaborately celebrated in the State of Michigan, under the auspices of the joint committees of the American Bar Association, the Michigan State Bar Association and the Detroit Bar Association, and the law faculty and students of the University of Michigan. The Bar Association of Detroit has annually commemorated the judicial services of a late eminent judge of that State, James V. Campbell. It was determined to consolidate the exercises in commemoration of Marshall and Campbell; and the celebrations were accordingly observed on the same day and occasion. The Detroit Bar Association provided for the publication of the addresses and proceedings on Marshall Day in a beautifully printed volume, edited and compiled by William L. January, of the Detroit bar, and embellished with portraits of Chief Justice Marshall, and Justices Campbell and Cooley, of the principal orator of the day, Luther Laflin Mills, and of Adolph Moses of the Chicago bar, who was the first to propose the celebration of Marshall Day.[1]

[1] The title page is as follows: "1801-1901. The First Centennial Anniversary, Celebration and Banquet. 'John Marshall Day.' February 4th, 1901. In memory of John Marshall, and his installation as Chief Justice of the Supreme Court of the United States, February 4, 1801. A record of the proceedings,—Letters, papers, etc., with a reproduction of the invitations issued, and the menu cards used at the banquet, together with the orations and addresses delivered in Detroit and in Michigan; containing also a report of the action of the Michigan legislature,—a *résumé* of the day. Edited and compiled by William L. January, of the Detroit Bar. Under authority of the Detroit Bar Association and the acquiescence of the State Bar."

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The publication edited by Mr. January contains, in addition to the proceedings and addresses on Marshall Day, the action of the Michigan legislature, which, as a tribute to Marshall's greatness and as an evidence of the present appreciation of the great work he did for our courts and our country, spread a testimonial to his abilities and character upon its records, and out of respect to his memory, and to enable the members of the legislature to attend the celebration, both houses adjourned from February 1st until February 5th. The volume thus printed contained also a eulogy on John Marshall by Alfred Russell, of the Detroit bar, reprinted from the American Law Review, January number, 1901; also an address by Russell C. Ostrander before the Ingram County Bar Association at Lansing, the capital of the State, on February 4th, and an account of the proceedings at the banquet held at the Russell House in Detroit on the evening of the same day, as well as other interesting data.

The exercises at Detroit were held in the Detroit Opera House on the afternoon of February 4, 1901, and were attended by the justices of the Federal Courts, the justices of the Supreme Court and the Circuit Courts of the State, and by large numbers of the profession from different parts of the State and many citizens.

The opening address was by John C. Donnelly, President of the Detroit Bar Association, introducing as the orator of the day Luther Laflin Mills. After referring to the manner in which the celebration of Marshall Day had been brought about, Mr. Donnelly said:

Address of John C. Donnelly.

As will be noted, the anniversary which we celebrate in the life of Marshall is that of his appointment to the

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bench of the Supreme Court. It is not like celebrating the anniversary of some event in the life or career of a great political leader, whose work has not resulted in great or permanent good, or in the vindication or triumph of sound principles of political economy or government. It means not alone that the Bar and the Bench think it is proper and have the desire to renew the expressions of former days by our predecessors in the profession giving testimony to the sterling patriotism, high personal courage, and private and civic virtue of Chief Justice Marshall, but it has a broader and greater significance which may not improperly be said to have justification in a greater or less degree from current and passing events. It means the recalling of the history of the career of the distinguished jurist in the varied walks of life through which he passed, and the renewal of the declaration of our adhesion to the great principles of constitutional law which he enunciated, and in so doing to declare it to be our solemn conviction that in his work upon the bench, and as the result of his judicial labors, are to be found the application of those principles of constitutional interpretation which give to the fundamental law of our country its vitality and strength.

It means the recognition upon the part of the Bar and Bench that their duty is not confined to the performance of the mere drudgeries of the profession, as they are met from day to day, but that they have a higher and broader function, out of which springs an obligation, at this time, to bring once more to the notice of the people the magnificent work of Chief Justice Marshall. He is recognized and accepted in its fullest sense as the greatest exponent of those principles of constitutional interpretation which give to the Constitution of

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the United States that scope and meaning and potentiality which lift it high above the level of a mere political compact, of fleeting expediency, and as having presented first to the intelligent comprehension of the American citizen the possibilities of greatness that lay within the grasp of the nation. Observant men in thinking upon the constitutional policy of the country, as reflected in our attitude at the present day, are disturbed at the apparent willingness of public men to ignore constitutional restrictions and limitations, and to seek to make of that instrument only a partial declaration of rights and powers and duties and privileges, and to find outside of the four corners of that document, not a residuum of national power and authority, but a perfect, complete and independent source from which can be drawn a justification for any national course or act in favor of which a majority of the people for the time being declare. To a reflecting person nothing can be more dangerous, and the mere fact that a majority, for the time being, declare in favor of a thing, does not justify a departure from constitutional methods and destruction of constitutional guarantees.

De Tocqueville has aptly declared that nothing in a free State is to be so dreaded as the tyranny of a majority over a minority. While recognizing the aptness of the language of the poet, in which he puts in the mouth of the dying king, "The old order changeth, yielding place to the new," yet we believe that, in the interest of moderation and conservatism, it is well to ask the people to study once more the principles of the Constitution. While we do not presume in this place, and at this time, to pass judgment, and either approve or condemn, we think that we lawyers and judges are, from our education and training, peculiarly fitted to observe and note where

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political policies press against constitutional safeguards and run counter to accepted political maxims, and we think that if a word of admonition is necessary, it is fittingly given, when we say to our countrymen: Study the life and character, learn and adopt and apply the principles of constitutional law declared by Marshall, and by so doing they cannot be false to liberty and humanity.

Address of Luther Laflin Mills.

The celebration this day of an important and significant event in the history of the Republic is happily concurrent with the opening of a new century in the progress of humanity's life. Manifest it is that facts are not determined by the calendar of days; and that no arbitrary limit can confine and classify the current deeds of men or give them a special character by any limitations of years. The stream of history flows on, unbroken, unhindered and persistent — varying in many ways — but always the flood whose past commingles with the present and the future, and sweeps forward forever. Yet the hand of Time, at the end of decades, generations, centuries, naturally leads men and nations to review the course and meaning of the past, and directs their thinking to a common purpose.

To find a measure for the remarkable character to the recognition of whose greatness and contribution to the nation's welfare this day is dedicated, it is not inappropriate that we briefly contemplate the beginnings, the growth and the achievements of the Republic. What a marvelous scene confronts our vision — not vast in its stretches of time like those of the empire of an ancient age, but vast, indeed, in development, experience, civilization!

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In 1776 thirteen small colonies, each distinct from the rest, with a population aggregating not three millions of people, individual communities, with different and at times conflicting interests, and no special bond uniting them, stood upon the eastern border of a mysterious wilderness whose darkness was the cover of a barbarian, savage race of men — a wilderness seemingly boundless and embracing the continent from the white man's limits to the far western sea.

These, as the foundations of the American Republic, were mere dependencies of a kingdom, colonial subjects of a distant government, struggling under the hard hand of a monarchy to which the members of their communities were attached, indeed, by filial ties, but which, seeming to have lost its nature as America's motherland, treated them with a harshness, severity and injustice through parliamentary legislation, orders of privy councils and edicts of a foolish and stern ruler, which even the thoughtful Englishman of the present generation, in all fairness, denounces. Governmentally, these colonists were a subject people, and as such were regarded and treated by the power above them. Pleading for their rights, they received denial and rebuke; their appeals for redress went for naught; their grievances were ignored, and the ground of their complaints was increased with recklessness or malignity. With patience they endured; with fortitude suffered; with hope looked forth to the dawn of a better day, when England should recognize the wrongs she was perpetrating and reform the evils of her conduct. Their patience was exhausted; the hope which they had indulged was ended, and under the fierce compulsion of tyranny they inaugurated a victorious revolution, whose righteousness was determined by the

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God of battles and whose justice stands confirmed in the tribunal of Christendom. Then began their struggle in war; thirteen individual colonies working for a common cause, but with no bond of unity save the mutuality of their sufferings and the oneness of their aspirations to be free. Thus they stood and fought together with alternating victory and defeat until they approximated to national sovereignty under their Articles of Confederation, and these remained for years.

But after the successful ending of the revolutionary struggle of seven long years was accomplished, the necessity of supplementing the Confederacy by a strong, unified, Sovereign Nation, with delegated powers and authority conferred by the States, merging into irrevocable unity, became apparent and mandatory, as essential to the permanent strength and growth of the country, for its subjective development, its proper relations with foreign governments and its defense against attack in war, and for the securing of the "blessings of liberty" to posterity. Out of the popular recognition of the emergency confronting the people came the convention of 1787, and the adoption of the Federal Constitution, and, by virtue of that fact, the fixed and final establishing of the United States of America as a nation among nations — the irrevocable result of the compact of the States — not itself a mere compact subject to conditions, or the continued concurrence of its parties, but a creation indestructible save as a revolution against its possible oppression might destroy it, or assaults from foreign enemies. Thus the Constitution meant nationality; it was the *vox populi* of America — not the impulsive utterance of the people yielding to the emergency of an hour, but the deliberate expression of their sentiments of freedom, democracy and law in the

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concrete forms, policies and regulations of a republic, for themselves and the generations following forever. It was the conspicuous governmental achievement of all history — the realization of the dream of an ancient philosophy, and the high ideals of the past's best philanthropy. It signified individualism self-controlled — personal liberty voluntarily limited by general rights — the yielding of men to the common cause of man. It was the product of a social emergency and also the ripe fruitage of political philosophy and the sentiment of liberty.

Once made free from monarchical power by the long struggle of the Revolution, the colonists were driven to the adoption of a form of self-government; therein lay the necessity of the situation. By their voluntary and aggressive acts they had separated from the established authority of an ancient kingdom; the method for their survival and permanent independence became at once the paramount American question. Liberty achieved; independence an accomplished fact in their political life — a still graver problem confronted their wisdom, thought, their new ideas of freedom, their aspirations, their hopes for future time. The public sentiment announced in the Declaration of Independence was a pronunciamento which, unique in history, was a surprise to the nations of men. Other peoples had risen against tyranny and demanded redress for their wrongs; centuries before, sturdy English yeomen had forced from their king the Magna Charta of their rights. But the attitude of the American colonists when they solemnly asserted their separation and independence from Great Britain was original, peculiar, startling. It was the protest, determined and unchangeable, of communities of men against tyranny — no sudden passionate revolt against wrongs; it was as deliber-

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ate as it was unanswerable and unsubduable. It had become too late for compromise or concession to end the controversy; the die was cast — ineradicably was stamped on the coinage of a new human aspiration the image of the Goddess of Liberty. Then came the conflict of physical forces — the war ships, the cannon, the destruction of property, the deaths of men, and all the courage, heroism and barbarism of war. No record shows a braver fight for freedom, conducted under no national organization — an uprising of the people in a determination for self-government.

Where in the records of national histories do you find a chapter to be compared with the story of the seven years' struggle of the American colonists? Patient, unfaltering, self-sacrificing, they made their fight; their endeavor, in its purpose, was to cast off tyranny and be independent of an arbitrary old-time ruler; their immediate purpose was for freedom; to that their spirit and energies were devoted; independence was their inspiring, controlling motive. Theirs was a noble revolt, and the judgment of mankind approves it. The effort of the colonists was unique in more phases than one; its chief surprise lay in the fact that it was an uprising against the supremacy of their ancestral institutions. Its principal motive at the last, after peaceful negotiations were closed, was the securing of separation. The future was almost lost in the present; the first issue was freedom. The strong man was to break the cords that held him. He broke the bonds and stood before the world in manly freedom — erect, determined, resolute; he was the hero of his century. His background was the wilderness; there also lay his future. This giant of liberty had accomplished his dream; he had emerged into the new life

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of its realization and stood before mankind as the revelation of a unique ideal. The freedom-seeking American was only a beginner; the accomplishing of his liberty was but a first step. A still harder task remained for his genius, his wisdom, his fidelity — the vaster labor of creating a Nation. Following the Revolutionary epoch came the great constructive period — that of the founding and upbuilding of a republic in which should not only be realized the dreams of the Revolutionists for liberty, but which should stand for all time as the guardian of the rights of man.

The Constitutional Convention occurred as the natural and necessary event which should open the way for safeguarding the results of war by the permanent institutions of peace. Those who composed this historic convention called to originate the form and frame of the Republic assumed a burden for their wisdom, judgment and foresight larger than had ever before been imposed on the minds of men acting in a like capacity. For them the past offered no precise precedents; the records of time furnished no republican examples to fit the needs of the new liberty and aspirations of American life. In the convention were the strongest men of the time; thirty-nine had been members of the Continental Congress; the Declaration of Independence bore the signatures of seven of their number. Of its members thirty-one were lawyers, of whom ten had been judges; eight of the members had been governors of States. There were Madison, Hamilton, Ellsworth, Wilson, Martin, Morris, Randolph, Rutledge, Franklin and Washington; and to them and their colleagues in the immortal work of the convention all mankind — thinkers, scholars, lovers of the people everywhere — render the tribute of honoring recognition.

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Framers of the American Constitution — originators of the one great successful system of a representative popular government which glorifies history — to you, at this beginning of another century, we speak our reverence and gratitude and bow our heads before your marvelous achievement.

A distinguished foreign writer of the present day has spoken, with a suggestion of irony in his words, of our "canonizing" the Constitution. Reviewing American life during the century just ended — the development of its civilization, its growth in the humanities, its rights of man protected and enlarged, its Christianity widespreading over the continent and leading society as well as the individual into purer and loftier sentiments and hope — its inspiring and redeeming influences on distant peoples — its constant torch of liberty held aloft for all the race, — we do well, indeed, to canonize the Constitution, by virtue of which arose, and in every stress of danger and attack has remained and will remain, a sovereign nationality. The first days of the twentieth century behold no grander fact of promise for the generations than the assured stability of the American Constitution. It has stood the test of the century just concluded; criticisms from certain classes of the people, attacks from discordant sectional interests, the passions of men and the fiercest civil war of history, from whose clouds it has emerged stately and sublime — a lofty mountain in the landscape of human institutions. The nineteenth century was a glorious era — a golden age of science, the arts, the uplifting of man, discoveries, inventions, charities, the magnifying of human sentiments as to spiritual things and the providence and power of God. But can Christendom now point to any grander result of the last one

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hundred years, accomplished by man under the guidance of the Almighty, than the confirmed integrity and permanence and development of the American republic?

The people of this country, in every State thereof, are honoring to-day the memory of a man who stands conspicuous and eminent in the constructive period of the Nation — John Marshall — who, on the 4th day of February, 1801, assumed his duties as the Chief Justice of the Supreme Court of the United States, the head of the most important department of the Federal Government, standing strong against erratic popular impulses, the transient opinions of men, the conflict of selfish, material interests, the ambitions of politicians; against these dangers, standing for the supremacy of the organic law of the land and the Federal Government as created by all the people. Great as is the province of the law-makers; broad as are the functions of the executive, more potent and essential than they, was always in our history, and still remains, the judiciary of the Nation, in whose Supreme Court lie the ultimate judgment of laws under the Constitution and a final determining power in legal crises, crises involving the rights of States and citizens and the perpetuity of the Republic.

Upon the horizon of American history, illuminated by its dawn, stand the heroes of our great beginning. Among them is one, calm, stately, imperturbable — the incarnation of thought, brave, impartial, independent, who represents more than all the rest, not the strategy and courage of war nor the statesmanship which originates governmental policies, nor the tact and skill of diplomacy, but the essential and conserving fact of law, in the existence of the nation, as the certain security of liberty.

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That man was John Marshall. Other men of the country's past have hitherto been worthily honored. Their biographies have been learned by the youth and manhood of the nation; their characters have become heroic for the admiration and veneration of American patriots. The province of their labors was that of aggressiveness, controversy, leadership, and thereon have converged the attention and interest of the people; the calm of his judicial life, great as was its results, may account, perhaps, for John Marshall's not having received that popularity to which his character and works have entitled him. The dates and deeds of the life of the great Chief Justice have never fairly been given to the common knowledge of his countrymen. They have rested in history, and no *vox populi* has aroused them until the present day, when, under the inspiration and guidance of a distinguished American lawyer, the people place a new hero in the temple of their patriotic worship.

The lawyers of every English-speaking land are familiar with his career; to them he is chieftain and leader — an ideal, and an idol. For them he sits with Blackstone, Eldon and Mansfield, and men like these, immortal in the veneration of those who constitute the membership of the great profession of the law, and within their knowledge lie his character and events, his deeds and glory. Still, true it is, his memory has not received the fame to which it is entitled from the countless millions of his beneficiaries. But now at last in the fair play of history, the quiet, the modest, the firm conservator of America's political system is brought from his comparative seclusion and made the inspiration of a nation's solemn holiday.

John Marshall was born not a hundred and fifty years

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ago in the State of Virginia, and reached his majority in the year of the Declaration of Independence. His father was a patriot, and was born and lived in that region of the Old Dominion where dwelt such men as the Washingtons, the Lees, the Masons, the Madisons, the Monroes; and where, against the British Stamp Act of 1765, Richard Henry Lee prepared the first declaration of the rights of the colonists and their protests against tyranny. The atmosphere of the youth's life was that of a community rebellious against injustice and assertive of the rights of man. In his boyhood, under his father's guidance, he was a student and scholar, a lover of poetry and history; and at the age of eighteen years he began the study of law. Before he was twenty years of age he was a lieutenant in a volunteer company in the Revolutionary movement. The news of Lexington had come from Massachusetts; the torch of the Revolution illuminated the Virginia mountains and was a beacon for their sons which summoned them. For more than four years he lived a soldier's life, patient and brave. He fought in many battles and endured the hardships of Valley Forge. Youth as he was, his commanders and comrades recognized in him his courage, resolution, ability.

At the age of twenty-five years, having studied law at William and Mary College, he was admitted to the bar and entered upon an important and extensive practice of the law. At the age mentioned he was elected a member of the legislature of his native State. He was a delegate in the convention of 1788, and therein shone his rare legal qualifications, his clear conceptions of what the new National Government should be, and a profound political philosophy.

In the courts of his State he was acknowledged to be

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the leader of the lawyers; intellectually, he was supreme among his legal associates. Of him William Wirt says: "He possesses an original and almost supernatural faculty; the faculty of developing a subject by a single glance of his mind and detecting at once the very point on which every controversy depends. No matter what the question; though 'ten times more knotty than the gnarled oak,' the lightning of Heaven is not more rapid or more resistless than his astonishing penetration."

There were, indeed, great lawyers in those days; then was the time of law as both a science and a sentiment. The spirit of commercialism had not permeated nor colored its fine air. Argument and advocacy in behalf of justice were its shining attributes. The compensating fee was not a principal object of the lawyer's endeavor; the selfish dollar was still subservient to the duty of his high calling. Those were the days when the appeals of Patrick Henry to courts and juries swept great causes to vindication and victory; when the logic of Jeremiah Mason and Luther Martin relentlessly broke down and pulverized all barriers of sophistry, and Daniel Webster stood colossal in reason, wisdom, argument, and walked before judicial tribunals with intellectual footfalls whose echoes are heard even unto this day. A glorious time, indeed, it was of lawyers; "there were giants in those days;" and among them was John Marshall — youthful, strong, the equal of any, if not the superior of all.

As a member of the Virginia Convention of 1788, called to consider the proposed National Constitution, he was but thirty-three years of age. Yet he was the leader of the high debate, the acknowledged master mind in the advocacy of the Constitution. His skill, logic, sincerity, conquered the opposition and won his cause. From 1788 to

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1797 he was again a practicing lawyer at the bar. In the latter year he was appointed by President Adams as a minister plenipotentiary to France, and, with Pinckney and Gerry, as equal associates, undertook a critical mission for the government, in the performance of which appeared his rare intellectual qualities, his determination, independence and devoted Americanism.

He was a member of Congress for two years and was the Secretary of State in the cabinet of President Adams, by whom, on the 31st of January, 1801, he was appointed the Chief Justice of the Supreme Court. The duties of this position he assumed on the 4th of February following, and these he retained for nearly thirty-five years. And at last, having lived four-score years, he passed from earth in the midst of the general grief of his countrymen.

In the formative period of the Republic he presided over what may be termed the most important branch of its government. Great judges were his associates in the supreme tribunal, but John Marshall was not only the formal chief, he was in reality the intellectual master above them.

In the years of his judgeship most vital questions of the government came before the high court wherein he presided. Then it was that the spirit, the true meaning, the purpose, the significance of the Constitution demanded exposition, interpretation, determination. And the call of the country for judicial decision as to the legal character of its political system was answered by the irresistible logic, the unequaled mental analysis and the clear expressions of John Marshall — always the man of self-poise, whom the noises of popular controversy could not disturb nor the conflicts of political parties affect.

Thus he earned the title of "Expounder of the Consti-

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tution," and as such, in a critical time of the republic, he helped to establish on the foundations of law the mighty fact of American nationality. His decisions in matters involving the integrity and the supremacy of the Nation became and have remained and will continue the final adjudication as to the relative rights of the Federal Government and those of the States existing under it.

Washington and the strong men around him, leading the people in war, had accomplished the separation of the colonies from the tyranny of an ancient monarchy; had erected in peace the governmental edifice of a republic—theirs were marvelous achievements in history. It remained for Chief Justice John Marshall as the highest representative of law, to place upon the work of the illustrious Fathers of the Republic the abiding seal of judicial approval and affirmation.

The Republic remains; its foundations were wisely and bravely laid. Its superstructure rises before mankind as the grandest social fabric of all times. Its cornerstone is the rights of man; its pillars are the will of the people; its mighty surmounting, encompassing and unifying dome is law. The nation is the creation of the express, spontaneous, popular judgment, and the concession of the individual citizen to the general welfare. Such is its meaning and significance. But the strength, the beauty, the permanency of its glorious dome of law are to be credited to the genius and fidelity of John Marshall, Chief Justice of the United States, as to the efforts of no other man.

Therefore the people honor his memory, and on this distinguished day proclaim their tribute of grateful veneration; and in the Pantheon of their heroes bend the reverent knee before the great John Marshall.

The court of which he was the presiding genius is

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still the supreme arbitrator of mighty questions of the Constitution; as in the beginning and through the century it was, so now it is, the strong anchor of our institutions — the essential, the conserving element of the national life. It is the country's Holy of Holies. It is the nation's final refuge — its ultimate institutional defender. It stands alone, independent, supreme. Only a revolution of the people could destroy it, and such a revolution would mean anarchy to the State and the ruin of the Republic. Not for the first time in its history is this department of the government now confronted by a grave question of the Constitution — a question involving the welfare of the Republic, in its long future. It is perhaps the gravest question presented for its determination since the days of Marshall. The issue is pending in the high tribunal; that it will be decided justly and righteously none may doubt. And because that Supreme Court has under its solemn consideration the momentous matter now before it, it becomes the American people to be silent and to await with respectful and unfaltering confidence the conclusion of the judges. The great court must not be disturbed by the influences of public feeling and the utterances of conspicuous men who represent its different phases.

On this celebrating day the Republic honors the memory of John Marshall, greatest of its judges, and pays tribute to his genius, wisdom and patriotism; it also salutes, with respect, the Supreme Court of the United States, of which he stands in history as its noblest representative; and the patriotic citizens of the nation solemnly bow in homage and glad obedience before the law of the land — the necessary and essential companion of its liberty.

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STATE OF TENNESSEE.

Marshall Day was commemorated in Tennessee by observances held under the auspices of the Tennessee State Bar Association, which resolved, at its annual meeting at Lookout Mountain, in July, 1900, to hold a special meeting at Nashville on the 4th day of February, 1901, for the celebration of the day. Accordingly, on that date the Association met, its President, George Gillham, presiding. The exercises were held in the House of Representatives, in the Capitol building. There was a banquet in the evening, given at the University Club, which was largely attended. The courts throughout the State adjourned for the day, including the Supreme Court of the State and the Court of Chancery Appeals.

The meeting in the hall of the House of Representatives was attended by legislators, judges and a large concourse of citizens. The principal feature of the exercises was an address delivered on the invitation of the Bar Association of the State by Horace H. Lurton, one of the judges of the United States Circuit Court of Appeals for the Sixth Circuit, on "The Life and Public Service of Chief Justice Marshall."

There was a celebration of the day by Cumberland University, at which celebration Waller C. Caldwell, a judge of the Supreme Court of the State, delivered an address on "The Early Life and Professional Career of Chief Justice Marshall," in Caruthers' Hall, at Lebanon, on the invitation of the trustees of the university.

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Address of Horace H. Lurton.

On this day one hundred years ago, John Marshall took his seat at Washington as Chief Justice of the United States.

Upon the invitation of the American Bar Association, and of the several State Bar Associations, the important courts of the whole country stand this day adjourned in celebration of this centennial anniversary of that great event.

In pursuance of this general scheme for the celebration of this anniversary, we have here assembled by invitation of the Tennessee Bar Association for the purpose of reviving the memory of his conspicuous services and illustrious virtues; believing that in the contemplation of such a character there is an inspiration which insensibly tends to elevation of character and nobility of living. The subject is so full of interest and opens up so wide a field for thoughtful contemplation that I feel profoundly impressed with my own insufficiency to do justice to the occasion, and can but recognize that, in selecting me as the speaker upon this great occasion, the Tennessee Bar have but given another manifestation of their ever too partial kindness and regard for me.

John Marshall was born in Fauquier county, Virginia, September 24, 1755. He died July 6, 1835, at the ripe age of eighty years. He was the eldest of a family of fifteen sons and daughters. His father was Col. Thomas Marshall, a plain Virginia farmer, a true patriot and a man of great mental vigor. Judge Story quotes Marshall as often dwelling with enthusiasm upon the character of his father. "My father," he would say, "was a far abler man than any of his sons. To him I owe the solid foundation of all my success in life."

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Col. Marshall rendered most distinguished service under Washington as a soldier of the Revolution as Colonel of the Third Virginia. Col. Marshall removed to Kentucky in 1785 with the younger members of his family. From these younger sons and daughters are descended many very honorable families now residing in Kentucky and Tennessee.

John Marshall's mother was Mary Isham Keith, the daughter of James Keith, a distinguished clergyman of the Episcopal Church of Virginia, and a double cousin of the last Earl Marichal Keith, and of Field Marshall Keith, the celebrated Lieutenant of Frederick the Great, King of Prussia.

John Marshall's education was not collegiate. It was for the most part self acquired. He early developed a strong love for English literature, and it is said of him that at the early age of twelve, under the guidance of his father, he was thoroughly familiar with Dryden, Shakespeare, Milton and Pope.

He had the advantage of only one year in a classical academy and one other year of instruction in Latin under the direction of a private preceptor. He began the study of law at eighteen; but the military preparations in anticipation of the Revolution much interrupted his studies, and before they were completed the stirring story of Concord and Lexington had found its way to Virginia and the young student became the ardent patriot soldier.

The graphic account by a kinsman, who was an eyewitness to Marshall's first appearance as a soldier, has been preserved by Allan B. Magruder, Marshall's biographer. It well portrays his simplicity of heart and manliness of spirit.[1]

[1] Magruder's John Marshall, ch. II, pp. 9–12.

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We have, my fellow-citizens, in the very human picture of Marshall's budding manhood there presented, an exhibition of those qualities which distinguished the man in every stage of his subsequent great career. The modesty and simplicity of demeanor, the self-poise and calm determination, the ardent yet far-sighted patriotism which he then displayed were prophetic of the man.

Neither time, nor service, nor responsibility, nor honor, nor office operated to efface the characteristics which he exhibited in this opening scene of his active life. After some short service with a corps of minute men, he was appointed a lieutenant in the Eleventh Virginia, and later became a captain. With the exception of the winter of 1779–80, he was continuously in the service of his country until February, 1781, when, owing to a superabundance of officers in the Virginia line, his resignation was accepted. . . .

In 1781 he began the practice of law in his native county of Fauquier. Tradition declares that so amiable were his manners, so conspicuous his abilities, that he leaped at once into a full country practice. Marshall, with his usual modesty, ascribed his early success to "the too partial regard of his former companions in arms."

In 1783 he removed to Richmond, where he continued to reside until his death, July 6, 1835. There he was placed upon a most conspicuous stage. Among his great rivals were Patrick Henry, John Wickham, James Innes, Alexander Campbell, Benjamin Botts and Edmund Randolph, all names which shine as bright stars in the legal firmament. He at once took rank with them as an equal, and very soon became recognized and known as chief among them.

His reputation rapidly extended so that he was not

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only employed in the majority of the most important causes in the courts of Virginia, but was often retained in causes pending in the Supreme Court of the United States and in the courts of other States. Great and widely extended as was his reputation, it is interesting to know that the emoluments of the practicing lawyer of that day were nothing like so great as those which are now received by the leaders of the bar, for we are told that Mr. Marshall's practice seldom paid him so much as five thousand dollars per annum.

His practice at the bar covers the period between 1781 and 1801. But this period of twenty years was by no means one of uninterrupted professional work.

During that time he was frequently induced to serve his State and the United States in places of honor and responsibility. He was four times a member of the Virginia General Assembly. He sat as a delegate in the great Virginia Constitutional Convention of 1788. He served in 1797, in association with Mr. Pinckney and Mr. Gerry, as an envoy extraordinary to France. He was a member of the Sixth Congress, and served for a short time in the cabinet of President Adams, as Secretary of State, in which last named place he was serving when made Chief Justice. None of these political employments was of his own seeking. They were all accepted from a high sense of patriotic duty, as a service which he could not honorably avoid in the then formative and critical state of the Union.

In each, his employment was of a kind which was well adapted to equip him for the vast service he subsequently rendered his country as the great expounder of its Constitution. To estimate his influence upon the institutions of his country we must know something of the conditions

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which existed when that influence was exerted. The struggle for independence, though successful, had exhausted every resource of the land. The Congress was without money even to pay the Continental soldiery, and they were disbanded with their pay in arrears and without means to make their way back to their homes.

Under the then Federal Constitution, the Congress had no power to lay and collect taxes direct or indirect and was wholly dependent upon requisitions made from time to time upon the several States. These requisitions had been irregularly and but partially complied with. The treasuries of the States at the close of the war were also bankrupt. Both the United States and the States had been driven to that last resort of a desperate people, the unlimited issue of a legal tender paper currency which depreciated until it became utterly worthless and carried down with it all credit, public and private. The gold and silver currency which had once been equal to the demands of trade had disappeared, and not enough remained to carry on the little commerce which had survived the general collapse. Neither commerce nor manufactures existed in any important sense. Confidence, both public and private, was gone. The peril of the common struggle for independence had drawn and held the States together under Articles of Confederation which gave so little real power to the Congress that its authority had fallen into contempt. The Union as it then existed constituted little more than a league of independent States, having power to represent the States only in respect to questions of peace and war with foreign nations.

Having the power to declare war, it had no power to

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raise armies except by requisitions upon the States for their several quotas. Having the power to command the army and to conduct the war and to incur debt for its maintenance, it had none to collect a revenue to meet its obligations and was dependent upon requisitions upon the States. It presented the anomaly of a national government having no executive to enforce its own laws and no tribunal to expound and apply them.

The purpose of those who had organized the Confederation was to create a perpetual Union whose affairs should be administered by a central government, having vitality sufficient to perform the functions of a national government. Yet it had no power to regulate commerce with either foreign nations or among the States. The result was that each State line bristled with custom-houses. The New Jersey farmer paid duty upon the marketing he carried across the bay to the market of New York, and when he returned he paid to New Jersey a duty upon the sugar and coffee for which he had exchanged it. The Confederation had power to make laws in respect of the limited duties committed to it and power to make treaties with foreign nations, which should constitute the law of the land. But it had no judicial tribunals through which it might enforce its own laws or annul those of the States which conflicted with its conceded powers. A result of this anomaly was that an important provision in the very treaty which secured us our independence, providing that no obstacle should exist to the collection of *bona fide* debts due to British subjects, was annulled by State laws which practically deprived the English creditor of all remedy or openly confiscated his debt.

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Marshall, in his life of Washington, thus speaks of the Confederation:

"Like many other human institutions," he says, "it was productive neither in war nor peace of all the benefits which its sanguine advocates had expected. Had peace been made before any agreement for a permanent Union was formed, it is far from improbable that the different parts might have fallen asunder and a dismemberment have taken place. If the Confederation really preserved the idea of union, until the good sense of the Nation adopted a more efficient system, this service alone entitles that instrument to the respectful recollection of the American people and its framers to their gratitude."

To patriots of the school of Washington, Adams, Hamilton, Jefferson, Madison, Monroe and Marshall, the period between the peace of 1781 and the final adoption of the Constitution in 1789 was most critical. The dismemberment of the Union seemed impending, and the fate of our experiment in self-government hung trembling in the balance.

That a great majority of the people entertained an opinion that our safety and prosperity depended upon a continuance of a Union of the States is doubtless true. That a wide difference of opinion existed among these friends of a Union as to whether it was essential to revise the Articles of Confederation or in any way strengthen the powers of the Federal Government is also most evident.

Marshall heartily concurred with Washington, Madison, Adams, Hamilton and others of that school in believing that the Union could not continue unless the powers of the Federal Government were greatly strengthened and vitalized, and that this could only be done

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through a convention which should frame an entirely new Constitution under which a perpetual and more complete Union should be organized. Filled with this sentiment he accepted a seat in the Virginia Assembly and exerted his utmost powers to bring about Virginia's concurrence in the call for a Constitutional Convention which might prepare the scheme for a more perfect and perpetual Union. He was not a member of the Federal Constitutional Convention which resulted, but was a member of the Virginia Constitutional Convention to which was submitted the question as to whether Virginia should ratify the proposed Constitution and accede to the new Union. It is an interesting fact that Marshall was elected to that Convention by a constituency largely opposed to its ratification and aware of his resolute determination to secure its adoption by Virginia. This fact testifies equally to the high esteem in which he was held and to the patriotism of many of the opposition who were unwilling to deprive the State of the benefit of his services though opposed to the views he was known to entertain.

The Virginia Constitutional Convention of 1788 was a most imposing body, containing as it did so large a number of men renowned for moral and intellectual gifts. It was filled with the very flower of the old Commonwealth.

Its debates extended over twenty-five days, and have perhaps never been excelled for dignity, eloquence and thought. The opposition was led by the fiery and eloquent Patrick Henry, who saw in the proposal to give to the Congress the power of laying taxes, raising armies and regulating commerce the destruction of the States and the annihilation of liberty. "In the title and office of President his vivid imagination and ardent love of democracy saw the coming of a kingly crown." Among

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the most conspicuous and ardent friends of the Constitution were Madison and Marshall. They avowed themselves friendly to a well regulated system of representative republican government, and maintained that we could not exist long as a nation of free people unless there was lodged in a Federal Government a power sufficient to control the affairs of a Union in as energetic a manner as the authority of the State governments should extend over the States.

"The supporters of the Constitution," said Marshall, "claim the title of being firm friends of liberty and the rights of mankind. They consider it the best means of protecting liberty."

The division of opinion in respect to the wisdom of adopting the Constitution shown by the debates in the Virginia Convention of 1788 was typical of the division which existed all over the country, then and for many decades subsequently.

"We were," said Marshall many years afterwards in his Life of Washington, "divided into two great political parties, the one of which contemplated America as a Nation, and labored incessantly to invest the Federal head with powers competent to the preservation of the Union. The other attached itself to the State Government, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members."

Marshall devoted himself in the debates particularly to the defense of those provisions of the Constitution which conferred upon the Federal Government the power of taxation, power over the militia of the States and the judicial power.

The final vote was close. By a majority of ten, Virginia ratified the Constitution.

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On the 4th day of February, 1801, Marshall took the oath of office and his seat as Chief Justice of the United States at Washington. Theretofore the Supreme Court had sat at Philadelphia. His predecessors were John Jay, John Rutledge and Oliver Ellsworth. Rutledge sat under an *ad interim* commission for one short session. His health failing, the Senate refused confirmation. Both Jay and Ellsworth resigned to accept other employment. Marshall's associates when appointed were William Cushing, William Paterson, Samuel Chase, Bushrod Washington and Alfred Moore.

Although the Constitution had been in operation for eleven years it had received no important judicial construction, other than the ruling in Chisholm *v.* Georgia, that a State was subject to suit in the Supreme Court by a citizen of another State. That ruling was a great surprise and aroused intense excitement, only dispelled by the immediate adoption of the eleventh amendment to the Constitution.

The great lines of political division which had existed in respect to the adoption of the Constitution still existed. For the most part those who had originally opposed its adoption continued to combat it by seeking to limit its operation and cripple its powers by means of what now seems an exceedingly narrow system of interpretation.

Thus the country was divided into two great parties, one of which was composed of those whose affections and hopes centered in the States and who feared that the powers of the Federal Government would prove inimical to their rightful power and influence, and therefore harmful to individual rights and liberties. Upon the other side were those who regarded the Union of the States under

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a strong and energetic government as essential to the preservation of our national independence, the happiness and prosperity of the parts, and as affording the surest guaranty of that civil liberty which it is the object of all free governments to secure. There was much in the current history of the times which, in the then formative state of our institution, tended to confirm the faith of those who regarded the permanency of constitutional government as in a high degree dependent upon the efficiency of the powers of the Federal Government to resist the disintegrating influences of the extreme political opinions which had found so terrorizing an expression in many stages of the French Revolution.

The adoption of our Constitution and the commencement of the French Revolution were nearly contemporaneous events. The fact is important, for the influence of the revolution upon political opinion here was marked.

The most extravagant political ideas of the times found hearty popular indorsement in many of the cities of the East, and the guillotine, as an instrument for the removal of "aristocrats" and of all who drew a sharp distinction between liberty and license, was commended in toasts, and sometimes in the more serious form of public resolutions. It was a time of political unrest. The very foundations of society were threatened. Already the French Revolution had shown the inutility of written constitutions as a restraint upon the French people.

Was this failure of free Constitutional Government in France ominous of what we might expect? Was any popular government in which liberty was regulated by law possible? How far and in what way could the fundamental limitations upon government found in a written constitution be enforced? How could the restraints placed

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upon the legislative powers be made effective? The whole problem as to whether a popular government whose powers were defined and limited by a written constitution was workable remained to be solved, for as yet our government had been subjected to no great strain and its powers had not yet been fully understood or determined.

A popular representative government whose powers were limited by a written constitution imposed by an organic law enacted by the people was a government unknown to history, ancient or modern. Great Britain had a constitution consisting in a body of political maxims and fundamental principles to be discovered in ancient institutions, customs and practices, or found in old statutes and charters. But the legislative power resided in parliament, and parliament, according to constitutional maxims, represented the whole ultimate power of the realm, and was therefore a power unrestrained by any authority lying behind it.

Parliament was omnipotent. No court could restrain its will or declare a law void for mere repugnancy to constitutional principles. The American theory was that a Constitution is the highest expression of the will of the people and that all power resided in them. But if the legislative power should seek to pass the bounds prescribed by the organic law, how was it to be restrained? If a law was repugnant to the Constitution, where resided the authority to annul the law?

In his memorable opinion in the case of Marbury *v.* Madison, decided in 1803, these questions were answered by Marshall.

In the light of his clear logic and of the subsequent experience and acquiescence of one hundred years it is now difficult to see how his conclusion could have been

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debatable. But for such a conclusion there were no precedents in jurisprudence, save in a few recent American cases, one of which was decided by the Supreme Court of Virginia in 1782 and another by the Supreme Court of North Carolina in 1787. Curiously enough the Virginia case was decided by Judge Wythe, Marshall's preceptor in the law, and still more curious is the fact that neither of these decisions is cited in Marshall's opinion, nor referred to in the briefs of counsel. This assumption by American courts of the power to declare a law void for repugnancy to the organic law was not universally accepted.

In Rhode Island efforts were made to impeach judges for presuming to declare any exercise of the legislative power void, and in Ohio the judges escaped only because a two-thirds vote was not secured upon the trial. Unless this power resides in the judiciary, how is a limited Constitutional Government possible? What is the value of the great principles found in our Constitution touching the sanctity of individual rights and of private property, unless there resides somewhere the power to annul legislation which disregards them? May we not justly attribute the continuity of the blessings of a representative government under a Constitution distributing the powers of government, and limiting within definite lines the functions to be exercised by each, to the great constitutional principles so luminously declared by Marshall in Marbury *v.* Madison? Obvious as now seem the conclusions there announced, it is interesting and impressive to know that no court outside of America even yet exercises any such jurisdiction.

To the absence of any such jurisdiction in the courts of France we may attribute the little respect entertained

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for constitutional limitations and the great extremes of political opinion and action which have characterized that country for more than a century.

The whole field of constitutional interpretation lay untrodden when Marshall went upon the bench. The great questions much agitated in that day included the inquiry as to whether the courts of the Union could constitutionally revise the judgments of the State courts in cases arising under the Constitution and laws of the United States; whether the States could constitutionally tax instrumentalities created by the Congress to carry out the granted powers of the Union, whether the Federal government could exercise any power which had not been granted in *ipsissimis verbis;* whether the power of Congress to pass all laws "necessary and proper" to carry out delegated powers was restricted to such means as were absolutely indispensable, or whether it might, in its discretion, adopt any means reasonably adapted to the end authorized; whether the courts of the Union could annul a State law which conflicted with the Constitution of the United States or a law or treaty made in pursuance thereof. All these and many other great constitutional questions are now forever settled in a series of opinions which Judge Story has described as "exquisite judgments, the fruit of his own profound meditations."

It may not too much weary your patience if I allude briefly to two or three of the most important of his great opinions.

After referring to the cases of Cohens *v.* Virginia, Gibbons *v.* Ogden, and McCulloch *v.* Maryland, the orator proceeded:

Marshall's political affiliations were first with the Federals and finally with the Whigs. That he entertained

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when he went on the bench very decided views in respect to many constitutional questions which had been raised in the political contests of his day must be admitted. But that his judicial judgment was unduly colored by such extra-judicial opinions we have no reason to suppose. His opinions betray no partisan bias, and he was ever careful after he assumed judicial duties to avoid activity in the field of party politics. It was very rare during Marshall's day that divisions occurred in respect of constitutional questions. Story, the ablest and most learned of his colleagues, was, when appointed, a most pronounced Anti-Federalist, yet he and the Chief Justice agreed in all of their constitutional judgments.

Most fortunate it is that these great constitutional cases arose at a time when the business of the Supreme Court was so limited as to enable it to give to their consideration the time necessary for full argument, the formation of well meditated judgments and for the preparation of careful opinions. Both the judge and lawyer of one hundred years ago had opportunities for original constructive work in the upbuilding of the science of jurisprudence which do not exist to-day. They were neither guided nor trammeled by precedents in respect to the greater number of questions which demanded solution. That they knew the existing law more thoroughly than their successors of to-day was because there was so much less of it to know. When Marshall went to the bar in 1781, there was not a single volume of American Reports. To-day there are perhaps five thousand volumes, which contain precedents which must now be taken into account by the well-equipped lawyer or judge. Though the Supreme Court had been organized more than eleven years when he became its Chief Justice, its published

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opinions occupied less than three hundred pages in the reports of Dallas, and the opinions in causes heard by the judges on their circuits, cover less than five hundred pages of the same reports. The opinions of the Supreme Court for the thirty-four years he sat upon its bench are embraced in thirty volumes, beginning with 1st Cranch and ending with 10th Peters, and more than half of each volume is occupied with the briefs of counsel.

During the first three years of his term the court heard but twenty-five cases, all reported in the first volume of Cranch. The opinions in twenty-four of them were by the Chief Justice. The growth of the business of this great court has kept pace with the growth of the country in population and wealth. Notwithstanding the division of appellate jurisdiction made by the Act of 1891, creating the present Courts of Appeals, in which perhaps a thousand cases are each year finally decided — which under the law as it formerly stood could have been appealed to that court, the appeals annually heard in the present court average about four hundred in each year, or as many as were heard in any decade during Marshall's incumbency.

Marshall was forty-five years of age when made Chief Justice.

Wirt has left us with a well known and interesting picture of him at that time.

Webster, then a member of Congress, in a letter written at the time, said, "There is no man in the court that strikes me like Marshall. I have never seen a man of whose intellect I had a higher opinion."

Pinkney, of Maryland, after listening to several opinions rendered by him, said, "He was born to be the Chief Justice of any country in which he lived."

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In Marshall's day, though there were comparatively few authorities to consult, he was not much given to the citation of those which existed.

Magruder, who wrote thirty years after his death, said that in his day there were living witnesses who, speaking of this fact, said "that he was wont, at times, to say substantially in the conclusion of his masterly decisions: 'these seem to me to be the conclusions to which we are conducted by the reason and spirit of the law. Brother Story will furnish the authorities.'"

He had an amazing capacity for discerning the very heart of a question, and stripping it of all its accidental or immaterial environments. His power of logical analysis has seldom if ever been exceeded, and here indeed lay the great intellectual strength of the man.

His courtesy and patience and attention, as the presiding judge of his court, was notable. He believed in the value of oral argument, and was very reluctant to have cases submitted on briefs alone. Horace Binney, one of the greatest lawyers of his day, and a man who had a large and continuous practice before him, said of him:

"He was endued by nature with a patience that was never surpassed; . . . patience to hear that which he knew already, that which he disapproved, that which questioned himself. . . . When he ceased to hear, it was not because his patience was exhausted, but because it ceased to be a virtue.

"His carriage in the discharge of his judicial business was faultless. Whether the argument was animated or dull, instructive or superficial, the regard of his expressive eye was an assurance that nothing that ought to affect the cause was lost by inattention or indifference, and the courtesy of his general manner was only so far restrained

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on the bench as was necessary for the dignity of office and for the suppression of familiarity."

I can only mention the fact that at the earnest insistence of Justice Bushrod Washington, the literary executor and favorite nephew of General Washington, Marshall during his judicial term wrote a life of Washington which did not prove to be a literary success. Neither can I refer to his work upon the circuit bench, though in that day a large part of the more important *nisi prius* trials in the Circuit Court were conducted by the justices of the Supreme Court, further than to mention the fact that he presided upon the trial of the brilliant and distinguished Aaron Burr, under an indictment for treason. The conspicuousness of the prisoner, the dramatic nature of the accusation and the illustrious character of the counsel who appeared for and against the prisoner, together with the fact that the Chief Justice himself presided, made it by far the most notable and famous trial which ever occurred in an American court.

During his incumbency of the office of Chief Justice he was again called by his State to serve as a delegate in the Constitutional Convention of 1829. He was then seventy-five years of age. That convention was a most conspicuous body. Among its members were included ex-Presidents Madison and Monroe, and the Governor and Attorney-General of the State.

In that day Virginia demanded the services of her ablest and best in every work which deeply concerned the State, and she called the great Chief Justice to counsel and advise in respect of the revision of the State's Constitution.

He served in that body with distinction, giving particularly great attention to the changes proposed which

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he thought likely to affect the independence and tenure of the judicial office.

I have spoken of Marshall's patience and modesty as the presiding judge of a great court. This was but an exhibition of his habitual bearing. He was ever simple, modest, gentle and considerate of others. Kindliness of heart, reverence for women, and gentleness of demeanor, won for him the love and respect of all whose contact was close enough to know his real self.

Though a great student and given to much communing with himself, as is the habit of the thinking man, he enjoyed the genial companionship of his brethren at the bar and is reputed to have indulged in story and anecdote down to the last years of his life. But neither these amiable personal qualities nor his conspicuous abilities, nor his shining services to his country, enabled him to escape bitter criticism and even calumnious assault.

He lived in a day of fierce political controversy and bitter factional and personal rivalries. A small political faction conceived that the political antagonism between President Jefferson and the Chief Justice had resulted in partial rulings which brought about the acquittal of Burr. So intemperate was the expression of disappointment at the result of that trial that the distinguished Chief Justice was subjected to the humilitation of being burned in effigy by a Baltimore mob.

Gifted as he was in endearing personal qualities, conspicuous as he was in all the virtues which ennoble and elevate man, he was also endowed with an intellect of exceeding rare qualities. In power of deep perception and close logical analysis he had no superior among the men of his generation. The thoughtful student of his speeches, addresses and judicial opinions can but perceive

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that he saw deeper into the heart of a question and with a clearer vision than any of his contemporaries.

With this power of insight and logical analysis, he possessed the rare faculty which belongs to the creator, the builder of institutions.

The post-revolutionary period abounds with men of high intellectual and moral attainments, men of learning, genius, eloquence and courage. At no time in our history and perhaps never in the history of the world did any nation possess at one time so great a number of men illustrious for public virtues and conspicuous as leaders of public opinion.

"A glorious Company,
The flower of men to serve
As models for the mighty world,
And be the fair beginning
Of a time."

But in this group of gifted and illustrious men, there were a few who, in addition to the gifts of the others, possessed to an unusual degree the constructive faculty, that of creative wisdom at work. It is the rarest of rare gifts. When we find it in combination with character, eloquence, courage, learning and ardor, we have before us a file leader in human progress. It is the highest gift of the gods.

"To the souls of fire,
I, Pallas Athena,
Give more fire, and to those
Who are manful
A might more than man's."

In Washington, Madison, Jefferson, Hamilton and Marshall we have a group of mighty men, who in constructive faculties far outshone all of their contemporaries. These were the real architects of this great and complex

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government, the real founders of a republic preserving liberty through law.

Marshall early saw the necessity for strengthening the bonds of union between the States and devoted himself to that work. While he did not directly participate in the making of the Constitution as it was submitted to the people for adoption, he threw himself ardently into the work of securing its acceptance. But the problem as to whether a paper constitution could be made to work remained for solution. The Federal system was complex. Sovereign States had surrendered many of their sovereign powers to the new government and had retained many others. Each government was supreme within its own sphere. The line which marked the boundary between the powers retained and those delegated was not always clearly distinguishable. Conflicts of jurisdiction must arise.

The powers which were granted by the States to the Federal Government were large powers, conferred in general terms and rarely defined. The instrument itself was the work of human hands and could but contain some words and phrases of ambiguous meaning. Would the new government for want of vitality share the fate of that created by the old Articles of Confederation or would it live? It there was no final arbiter by which the Constitution might be construed and enforced; if there were to be as many interpretations as there were States, it could not live, it must die.

In what spirit should it be interpreted? Was it to be approached as an obligation resting heavily upon unwilling shoulders and construed as a penal bond would be? This was not the attitude of John Marshall. He saw in it a Constitution. It was to him the organic law which

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gave expression to the highest aspirations of a free people for a Federal Union which should be as efficient within its sphere of action as were the States within their own reserved jurisdiction. "The letter killeth but the spirit giveth life."

He came to the duty of construing and applying the Constitution in the spirit of those whose handiwork it was. He read its short but majestic lines with that insight into their meaning which came from a knowledge of the great objects which it was the purpose of that instrument to subserve and with the larger conceptions which come from a sympathetic attitude. With a steady and impartial hand he upheld the exercise by the Union of all the powers which had been granted to it, and with an equally firm determination protected the States against encroachment. His influence upon the Constitution and upon our institutions cannot be too strongly expressed.

I cannot go into details. I must on such an occasion deal in general statements. Into our complex government he breathed the breath of life, and the dead letter of a paper Constitution became a living spirit. Under his masterful impulse the Constitution has been made to march. Whether we agree or disagree with all of his interpretations is not a matter of contention now. Constitutions like other instruments get themselves construed, and when construed authoritatively that is the end of controversy in a government of law and order. The debt of gratitude which we owe to Marshall can never be paid. To him, my countrymen, more than to any other single influence may we attribute the fact that our experiment in self-government has vindicated itself and that the nations of the earth behold a strong and free people, whose liberties rest upon the solid foundation of law.

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The struggling republic whose right to live was doubted, whose future none could foresee, still lives. A century of achievement lies behind us and now we stand in the forefront of the nations. We have not attained this vantage ground without bitter internal differences and strenuous conflict.

Questions there were which acquired temporary importance through their bearing upon an inherited institution, which so deeply involved the nature of the Union and the fundamental purposes and objects of government as to defy solution through discussion or the judgment of courts, and to which answer could only be made through trial by battle. But through all the conflicts and trials which have beset us we have emerged a united people more closely cemented in sentiment and aspiration than when the century began.

Dark as may have seemed the promise at moments, the great fundamental principles of civil liberty have suffered no impairment. The orbit of the United States and of the States united has been marked. The sovereignty of each within its constitutional sphere is no longer disputed. The mighty problem as to whether the great powers of government could be efficiently restrained and limited by a self-imposed organic law has found its answer. We know now that "a government of the people, for the people and by the people" need not perish from the earth.

Let us, therefore, give hearty thanks for the great services and good example of the illustrious patriot whose memory we this day do honor.

We give below that portion of the address of Judge Caldwell, above mentioned, which relates to Chief Justice Marshall as a jurist.

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Address of Waller C. Caldwell.

One of the most important and most fortunate events in all American history was the appointment of John Marshall by President Adams to the position of Chief Justice of the Supreme Court of the United States, on the 31st of January, 1801.

His rare talents found their greatest opportunity for exercise and triumph in the exposition and application of the Federal Constitution. That instrument, recently born of new conditions and for new relations, was in many vital particulars unlike any other that had ever been written. "The creation of a national government, by the terms of a written paper, was, as yet, a bold novelty, a brilliant but perilous experiment, made alarmingly complex by the establishment of collateral semi-sovereignties in the shape of the thirteen States." (Magruder.)

The construction of that paper was concededly the paramount responsibility of the court. It presented some of the most momentous questions that ever came before a human tribunal; and, for their wise solution, it was the marvelous power of Chief Justice Marshall on which his associates mainly relied. By their choice he prepared and delivered the great majority of the court's opinions on constitutional questions. His insight was so keen, his reasoning so cogent, his argument so persuasive, his illustration so clear, and his conclusion so irresistible, that there were but few dissents from his matured views, and fewer instances in which he, from inability to convince the other judges, himself had occasion to dissent. Though largely so, his deliverances were, however, of course, not altogether the product of his own wonderful mind. He could but have been materially aided by conference with the other distinguished members of the

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court, and by the arguments of one of the ablest bars that ever practiced before any tribunal. "He was solicitous," says Judge Story, "to hear arguments, and not to decide causes without them. And no judge ever profited more by them."

All men agreed that the prosperity and stability of the government depended on a right construction and enforcement of the Constitution, yet there were wide divergences of opinion as to its true meaning. The warmest and most persistent rivalry was that between the Federalists who sought a liberal construction in the interest of a stronger general government, and the anti-Federalists who contended for a strict construction in the interest of greater power in the States. These conflicting views were urged with tremendous zeal and earnestness upon the hustings, in the press, and at the bar, each side conscientiously believing that its view was the best for the people at large. In court and out of court, Hamilton and those of his faith honestly insisted that the Constitution meant what they thought it should mean, and Jefferson with his followers that it meant what they thought it should mean.

The court, through the Chief Justice, said that neither a liberal nor a strict construction was allowable, but that the words of the instrument should be given their natural meaning, without extension to objects not contemplated on the one hand, and without restriction to insignificance on the other hand. (9 Wheat. 187; 12 id. 332.) However, "he was evidently more fearful of the centrifugal than of the centripetal force in our system;" and, as a consequence, generally resolved all doubts in favor of that view which gave the General Government the greater scope and strength.

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The powers of the Federal Government, like those of the States, are by the Constitution vested in three co-ordinate departments: the legislative, the executive, and the judicial; each of which is absolutely essential to the efficiency of the others, and yet entirely independent of them in its own peculiar sphere. Judge Peck, of the Tennessee Supreme Court, said: "The legislative, the executive, and the judicial departments are three lines of equal length, balanced against each other; and the framework, forming an equilateral triangle, becomes stronger the more its parts are pressed. Like the foundation of our religion, the trinity, it is the key on which the whole arch rests." (2 Yerg. 611.)

In the construction of the Federal and State Constitutions, however, an important and ever-to-be-observed distinction is, that the Federal Government has only such powers as were delegated to it by the States, and the latter have all power not so surrendered. The Federal Government can rightly do only such things as are permitted by its Constitution; while the States can do everything not forbidden by that instrument or their own Constitution.

Though this distinction was readily recognized from the first, the lines of demarcation between delegated and reserved powers, and the limits within which the Federal Government might constitutionally act, were often very difficult of location and definition. This difficulty produced controversies innumerable, which were finally adjudged by Chief Justice Marshall and his associates on the bench.

There was in those times much jealousy between the different departments of the government as to their respective functions, and as to the power of one to question

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another's action upon constitutional grounds or otherwise. This also gave rise to disputes involving great problems for ultimate solution by that court.

The subsequent development of this government into the best one on the face of the earth was due in large measure to the calm, fair, just and wise manner in which that tribunal, principally through its distinguished head, discharged those grave and onerous responsibilities.

The gravity and magnitude of some of the more important questions presented to that court can best be impressed by a brief reference to a few of the cases in which they arose.

The learned orator here reviews and comments on the cases of Marbury *v.* Madison, the Dartmouth College Case, McCulloch *v.* Maryland, and on the trial of Burr for high treason, and concludes with an interesting sketch of Marshall's private life and character.

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STATE OF OHIO.

At the annual meeting of the Ohio State Bar Association, July, 1900, it was voted to hold a special meeting of the association in Columbus on February 4, 1901, appropriately to observe Marshall Day. John A. Shauck, Chief Justice of the Supreme Court of the State, was selected to deliver the oration. An executive committee arranged the details. The place selected for the address and proceedings on Marshall Day was the auditorium of the Board of Trade in Columbus. The address was followed in the evening by a banquet at the Neil House, at which James H. Hoyt, of Cleveland, presided. Sentiments were responded to as follows: "Judicial Independence," by William R. Day, formerly Secretary of State of the United States and now judge of the United States Circuit Court of Appeals; "Ohio's Place in the Supreme Court of the United States," by W. Z. Davis, of the Ohio Supreme Court; "The Part of the Bar with the Work and History of the Supreme Court of the United States," by Judson Harmon, formerly Attorney-General of the United States; "Trials of American Lawyers," by Thomas E. Powell, of the Columbus bar; "The Ordinance of 1787," by His Excellency, Governor Nash; and "The Bench as it seems to Me," by Clarence Brown, of the Toledo bar. Remarks were also made by Edward Colston, of Cincinnati, a grandnephew of Chief Justice Marshall.[1]

[1] The proceedings at Columbus, including the main address and responses so far as reported, were published at length in the Weekly Law Bulletin and Ohio Law Journal, vol. 45, No. 8, February 25, 1901.

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Chief Justice Shauck was introduced by Oscar T. Martin, of Springfield, one of the vice-presidents of the association.

Address of John A. Shauck.

The beginning of the century which has just closed was approximately the beginning of the era of constitutional government, according to the American understanding of that phrase. A century ago to-day its development received a mighty impulse when John Marshall, by appointment from the second President, became the fourth Chief Justice of the United States in actual service, the fifth in appointment. The propriety of his selection for that high station was generally recognized at the time by all who were in full sympathy with the complex system of government which had been undertaken. It became more and more manifest as the thirty-five years of his service passed, each bringing him opportunities to contribute something more toward finishing and securing the great work of nation-building which had been commenced in the arduous struggle of the Revolution and advanced by the adoption of the Constitution. The value of his services and the high character of his contributions toward the development of the important departments of the law upon which he left the deepest impress have so grown in appreciation during the sixty-five years which have passed since his death, that his appointment is now recognized as the principal ground of public gratitude to a President whose administration was characterized throughout by intelligence and patriotism. His mastery of the principles of constitutional and international law, and his ability to apply them accurately, do not quite cease to appear phenomenal, even

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after the most careful study of his character, his natural endowments and his appropriate preparation.

His birth was twenty years before the Declaration of Independence, and somewhat nearer the beginning of the armed conflict between Great Britain and the American colonies. His education was the best available where he lived, embracing English, mathematics, history, more than the rudiments of Latin, and a profound knowledge of the English classics. He began the study of law at the age of eighteen years, but had made little progress when Lexington proclaimed that the controversy between England and the colonies had reached its last and most dramatic stage. He had studied carefully the merits of the controversy to the conclusion that the aggressions of England justified the colonies in resisting to the extreme of war. With respect to the inheritance of moral qualities one may be an heir of the living. At the age of nineteen years he entered the conflict as a lieutenant in a Virginia regiment in which his father was a field officer.

After the engagement at Great Bridge, where a patriot victory drove the royal governor to the King's fleet, he joined the army in the north. He tasted victory with Wayne at Stony Point and with Washington at Monmouth. He was tested in the reverses at Brandywine and Germantown. He was disciplined in the gloom and the sufferings of Valley Forge. Notwithstanding his youth, he was distinguished among the officers of that army for bravery, for intelligence and for serenity in the midst of vexations — distinguished for the qualities which were subsequently to make his name so illustrious. That he attracted the admiration and confidence of the commander-in-chief was of abiding importance, for it was to

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call him into the public service in critical periods which were to follow the war.

On the reopening of the courts of Virginia after the surrender of Cornwallis he began the practice of law. His professional studies had chiefly been pursued amid the turmoil and distractions of the war, and he could not have brought to the bar the fruits of extensive research.

His grasp of legal principles was intuitive. His aptitude for his chosen profession was apparent. Hosts of friends were attracted to him because of his splendid intellect, his lofty character and his genial nature. He at once took position in the foremost rank of the profession and fortified it at every trial of strength. He was entirely without those arts which are commonly designated by the phrase "the graces of oratory." The character and habits of his mind were already established. His talent was analytical and constructive. He would have been metaphysical if he had not been intensely practical. He never interrupted the flow of his own discourse. He restated no proposition. He made no room for catch phrases. His sentences were incisive, and every sentence was a step in the direct and resistless progress of his mind from premises to conclusion. A contemporary aptly likened one of his discourses to the easy but unremitting advance of the dawn. His speeches, like his opinions, abound in sententious questions, not only those general questions which comprehend cases and subjects, but those subordinate questions which occur in the process of analysis and argument, so stated as to suggest inevitable answers.

His aptness for his chosen profession was illustrated by conspicuous triumphs even in his youth. His devotion to it was shown by numerous refusals of tempting invita-

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tions to enter public life. But the dominant question of the times was in his estimation of vital importance. It was whether the liberty which had been achieved by the Revolution should be enshrined in a government capable of preserving it, or be permitted to fall into anarchy and disappear in despotism. Liberty had sojurned upon the earth before, and such had been its fate. He had seen the war of the Revolution prolonged through unnecessary years. He had passed through defeats which would have been victories if there had been a government authorized to command the military resources of the people. He was an appreciative and humiliated witness to the embarrassment which resulted from the inability of Congress to perform its treaty obligation because it was without power to levy a tax. All about him his maimed and broken companions in arms were in want because Congress was unable to pay them the promised compensation for military services. He had seen a nation conceived in patriotism born in repudiation. He could not refuse to aid a cause which he believed to be necessary to complete the work of the Revolution. He accordingly accepted service as a member of the legislature of Virginia, where he was tireless in his efforts to secure a favorable response to the calls of Congress. Everywhere he was an earnest advocate of a competent general government.

Upon the submission of the proposed Constitution he became an earnest advocate of its ratification. In 1788 he entered the Virginia convention which was called to decide whether that instrument should be ratified. Though known to favor ratification, he was chosen by a constituency opposed to ratification.

If his career had ended with the Virginia convention,

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when he was only thirty-three years of age, he would have held a high and permanent place among the authors of constitutional liberty.

For the ensuing nine years he devoted himself to his profession with great and constantly increasing reputation, achieving high rank among the lawyers of the nation. He declined the invitation of the first President to become a member of his Cabinet as Attorney-General, and also the mission to France. He did, however, for brief terms reluctantly, but dutifully serve as a member of the Virginia legislature, where the cause of nationality met stubborn opposition.

In 1797, when war with France seemed imminent, he was appointed one of three commissioners to that country. His selection was determined chiefly by his thorough knowledge of the law among nations. He did not feel at liberty to decline the appointment. At Paris, communications passed touching the relations of the two countries, those on the part of France being written by Talleyrand, those on the part of the United States by Marshall. The controversy concerned the rights of neutrals, or more precisely the right of the United States to remain neutral in the conflict between France and Great Britain and its right honestly to maintain the neutrality which it had declared. He was quite able to confound the minister with his learning and to refute every accusation brought against the United States. But after a few months of vain endeavor to bring either the Minister or the Directory to a course of rational conduct, or even to honorable and respectful negotiation, he returned to the United States. An abundance of contemporaneous evidence shows that by his learning and bearing during this brief but trying mission he exalted the American name in Europe, and his own name among patriotic Americans.

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Upon his return, in view of the emergencies then existing, he consented to an election to Congress in order that the government might be supported by the representative from his district. Before the expiration of his term the danger of war had passed and he resigned his seat. He then served for a few months as Secretary of State in the Cabinet of the second President, writing State papers of conspicuous ability and of permanent value. In the meantime he had declined the office of Associate Justice of the Supreme Court. In the legislative bodies in which he sat he had vindicated constitutional prerogatives of the President by arguments which carried conviction to unwilling minds, and dissipated the opposition of hostile majorities.

Thus prepared he came to the office of Chief Justice. Now indeed the days of the Confederation were numbered and the efficacy of the Constitution to develop the might of the nation was to be made manifest. The enemies of the Constitution had not accepted its ratification as the conclusion of the struggle. In Congress, in the legislatures and courts of the State, and in public assemblies, efforts to impede the government in the exercise of the powers conferred continued to be made. From this opposition the Federal courts were not exempt. Their process was resisted, and the finality of the judgments of the court of last resort was often denied. France was exhibiting the abhorrent crimes which may be committed in the name of liberty; and many of our forefathers, applauding the spectacle, desired to reproduce it here. Although more than ten years had passed since the organization of the Supreme Court, but few constitutional questions had been decided. It had been decided in 1793

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that the Federal courts had jurisdiction of a suit against a State by a citizen of another State. This was contrary to the view presented by Marshall in the Virginia convention; and the Eleventh Amendment, expressly denying such jurisdiction, had followed the decision. Although the judges of the court were men of ability and patriotism, who neither abandoned their duty nor acquiesced in the degradation of the court, it had accomplished but little of the great work which had been assigned to it. Its position was pathetically described in a sentence by the noble but over-tried Jay. The President had invited him to return to the office of Chief Justice for the purpose, as he said, of "furnishing the country with the best security afforded its inhabitants against its increasing dissolution of morals." In his letter of declination, written January 2, 1801, Jay said: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which were essential to its affording due support to the general government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess." Surely, here was need for the intrepidity of John Marshall. His appointment followed.

Another lawyer never entered such a world of opportunities. It was known and said that the Constitution was the result of many patriotic concessions. Perhaps no one who supported it in the General Convention, or in the State conventions, was quite satisfied with its provisions. The concessions were not wholly, nor chiefly, with respect to its definite provisions, but rather to those which vested power in such general terms that the Constitution, in respect to matters of gravest importance, was properly regarded as an instrument enumerating, rather

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than defining, the powers conferred. To the provisions of this charter men of opposite views gave their support, each hoping that in its practical operation the instrument would be found expressive of his views. Of the many questions thus left for construction the most important, so far as we can yet see, were to be determined in the time of his service which embraced what has been aptly called "the golden age of the Supreme Court." It was now to be demonstrated that the feature of the Constitution which was dictated by the purest patriotism was justifiable by the highest wisdom; that with respect to constitutions, as well as other departments of the law, that which is most valuable results from the slow processes of evolution, and that to the highest form of statesmanship faith in others and in the future is indispensable. Recalling, for this occasion, only the very greatest of Marshall's opportunities, the first in time — if, indeed, it was not first in importance — came in Marbury *v.* Madison, decided in 1803. The case determined two questions of lasting importance. They arose out of the alleged unconstitutionality of the act by which Congress had attempted to confer upon the Supreme Court the original jurisdiction which it was then asked to exercise. By reasoning so convincing that it does not appear to have been doubted since, he sustained the proposition that a constitutional grant of original jurisdiction to a court, accompanied by a grant of legislative authority to confer upon it appellate jurisdiction, excludes the power of the legislature to confer other original jurisdiction. The second question was whether a legislative act, repugnant to the Constitution, can be the law of the land. The question was not quite new then, but it was undetermined. Some doubts and varying views respecting it had been

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expressed in the circuits, and opposite conclusions had been reached by courts of last resort in the States, some of them holding that a constitutional limitation upon legislative power is a mere admonition to legislative bodies. The remorseless reasoning with which he refuted that view remains a model of juridical literature. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the legislature repugnant to the Constitution is void."

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This was the realization of the promises of the Constitution. It was the nation's escape from the insecurity of life and property which attend the exercise of unlimited power, whether it be exercised by King or Parliament. It was the fulfillment of the hope which fifteen years before he had offered to those who feared congressional tyranny.

Then followed rapidly cases in which the same doctrine was applied to acts of State legislatures; and it was shown that the Constitution of the United States contains what may be deemed a bill of rights for the people of each State. Numerous propositions of importance were decided in *Ex parte* Bollman and another in 1807 and stated and supported with his accustomed clearness and vigor; that the jurisdiction of the court is derived from the Constitution and laws consistent with it; that jurisdiction is authority to decide between individuals and between States and individuals; that it is clearly distinguishable from the inherent powers of courts to control their officers and enforce their process; that jurisdiction in *habeas corpus* was conferred upon the Supreme Court by the Judiciary Act of 1789, and that the inquiry concerned not guilt, but the legality of the detention.

His definition of the elements of the crime of treason in that case and upon the trial of Burr, which soon followed, evoked much criticism in the excitement of the time. If in the calmness of present retrospect there are those who think that too much was required of the prosecution, so long as the impartial administration of justice shall be held dear, there will be universal admiration for the judge unmoved by criticism of President or clamor of populace and unaffected by his own unfavorable opinion of the general character of the accused.

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Whether it resulted from a deliberate purpose to defy authority, or from inveterate inability to locate the boundary between State and Federal jurisdiction, it was found necessary in the case of the United States *v.* Peters, decided in 1809, to announce a vigorous opinion to enforce, if not to sustain, the proposition that the legislature of a State cannot determine the jurisdiction of the courts of the United States, nor annul their judgments.

Now and then the admirers of political bric-a-brac advance the view that the Constitution emanated from the States, and not from the people. Marshall's great opinion in M'Culloch *v.* Maryland (1819) left small reason for adhering to that view.

The ultimate proposition established by the case is that a State government cannot tax any of the constitutional means employed by the General Government to execute its constitutional powers. The same doctrine was defined and enforced in Osborn *v.* The Bank (in 1824), when the people of Ohio were called back from nullification to obedience.

M'Culloch *v.* Maryland was followed closely in doctrine as well as time by Cohens *v.* Virginia. The most important question was whether the court had jurisdiction to review a judgment of the court of last resort in a State by which a right or immunity claimed under an act of Congress had been denied. The jurisdiction had been exercised before with deliberation and upon reasoning which would now seem conclusive. But the heresy involved in its denial had many determined and aggressive adherents. The ingenuity of counsel in assailing it in this case, and the transcendent importance of the subject, aided no doubt by a desire to bring the bar and the people to a course of right thinking with respect to

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it, induced him to consider it in the light of the principles and reasons involved as though it had not been previously considered. In support of the constitutional validity of the Judiciary Act of 1789 he presented such a searching analysis of the provisions of the Constitution and of the history of the period which brought it into being as indicative of the purposes which should be effectuated by its interpretation, that there is much reason for the judgment of those who regard it as his greatest opinion — that is, as the greatest of all judicial opinions.

We often hear it said that in the year 1865 the enduring character of the Constitution as a national compact was affirmed by the arbitrament of war. The implication is that it had not been authoritatively affirmed before. But attend to a page of Cohens *v.* Virginia where an argument in favor of the finality of the judgment of the State's court of last resort is stated and answered thus: "No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own courts rather than on others. There is certainly nothing in the circumstances under which our Constitution was formed, nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. The requisitions of Congress, under the Confederation, were as constitutionally obligatory as the laws enacted by the present Congress. That they were habitually dis-

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regarded is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so improbable that they should confer on the judicial department the power of construing the Constitution and laws of the Union in every case, in the last resort, and of preserving them from all violation from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of the new system? . . .

"The counsel for Virginia endeavor to obviate the force of these arguments by saying that the dangers they suggest, if not imaginary, are inevitable; that the Constitution can make no provision against them; and that therefore, in construing that instrument, they ought to be excluded from our consideration. This state of things, they say, cannot arise until there shall be a disposition so hostile to the present political system as to produce a determination to destroy it; and, when that determination shall be produced, its effects will not be restrained by parchment stipulations. The fate of the Constitution will not then depend on judicial decisions. But should no appeal be made to force, the States can put an end to the government by refusing to act. They have only not to elect Senators, and it expires without a struggle. It is very true that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the Constitution, and the people can unmake it. It is the creature of their will. But this supreme and irresistible power to make or unmake resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

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"The acknowledged inability of the government, then, to sustain itself against the public will, and, by force or otherwise, to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself against a section of the nation acting in opposition to the general will."

The case is reported in the sixth volume of Wheaton's Reports. It is the subject of lasting regret that in December, 1860, the volume had disappeared from the library of President Buchanan.

In Gibbons *v.* Ogden, decided in 1824, the grant of "power to Congress to regulate commerce with foreign nations and among the several States" was subjected to his searching analysis. This was the power whose selfish and hostile exercise by the States in the days of the Confederation had brought them to the verge of war, thus creating the most powerful of the incentives to the adoption of the Constitution. But this case arose out of legislation and adjudication in the State of New York which proceeded as though the days of the Confederation were not yet numbered. A suggestion, ingenious if not novel, in favor of the validity of the State's action with reference to the subject, notwithstanding the grant of power to Congress and the exercise by Congress of the power granted, was thus stated and answered: "As preliminary to the very able discussions of the Constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected to each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they con-

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verted their Congress of Ambassadors, deputed to deliberate on their common concerns and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected."

Very many of the errors into which we fall in our processes of reasoning, and of the doubts which reflection and analysis should dispel, result from the improper use of words. It would be interesting to know how materially the happiness and advancement of the nation would have been promoted if the Congress of the United States had always been designated as the Legislature of the United States, and the offices of the States under our complex system as State functions, and never as State rights.

As if with a prevision of the magnificence of empire, commerce and statehood now realized, he so defined the boundaries of this important power as to enable the General Government fully to accomplish the objects for which the power was conferred, and yet leave to every State the control of its internal commerce, and opportunity for the appropriate exercise of its police power. The intermediate conclusions there stated are founded upon principles so clearly expressed as to suggest every limitation which subsequent experience has made necessary, and to make the conclusions the unerring guides to the Nation and the States; and the principles of interpretation there invoked have been substantial aids in the interpretation of other provisions. Grants of power of this nature have no limitation which is not imposed by the Constitution itself;

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commerce includes navigation and all modes of commercial intercourse; commerce among the States, though excluding that which is wholly within a State, includes that which traverses it or penetrates it from without; authority to pass inspection laws, health laws and other laws, not implying power to regulate commerce which is wholly or partly external, is in the mass of jurisdiction which resides in the States.

In the meantime the court, in diverse causes arising on land and sea, was developing all the departments of the law embraced within its wide jurisdiction with such learning and ability as to entitle the court to the confidence and respect of the nation, and attract to it the attention of the civilized world.

Marshall had devoted a third of a century to the duties of his high office when he came to Worcester *v.* Georgia, the last of his great opinions. The years had brought to his intellectual powers, not failure, but fruition. We are not now to look upon the flickering of a feeble light which is about to be extinguished, but upon the effulgence of a western sun, which, though it is soon to pass below the horizon, will continue the guidance of its light reflected. This is not entitled to be considered his greatest opinion; because others involved questions much more vitally affecting the nation. What was the nature of the case? He comprehended it in a sweeping sentence: "The legislative power of a State, the controlling power of the Constitution and laws of the United States, the rights, if they have any, and the political existence of a once-numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered." Juridical literature does not suggest another whose resources would have been adequate to the pro-

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duction of this opinion. It is the opinion of the philanthropist, the champion of treaty obligations, the historian of the colonies and of the Revolution, the master of the law among nations, and the father of constitutional interpretation.

In his day the Supreme Court was not only the tribunal for the final and authoritative determination of questions involving the powers of government and the rights of people, but it was for people and judges a school for the profound study of the Constitution. The same questions of power were argued again and again, the desire of counsel apparently being to ascertain the effect of changes in the composition of the court, or of some new objection or the restatement of an old one. They were heard with patience and answered with care, as if the court deemed no time too important to be devoted to considering and expounding the provisions of the Constitution. Outside the court the people and the politicians learned slowly, if at all. In it the judges learned rapidly. After Marbury *v.* Madison and before the other cases to which special reference has been made, the composition of the court, excepting the Chief Justice and one associate, was completely changed. No one then suspected, no one familiar with the history of those times will suspect, that the new judges were appointed because of their enthusiastic acceptance of the national doctrines of the Chief Justice. But they were men of ability and patriotism, and when they met the grave responsibility of supporting the Constitution as its meaning was revealed in the light which shone there, not one of them would consent that the government should fall by a decree of the tribunal which had been appointed to maintain it; and the life-

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giving national doctrines of those cases were laid down with the concurrence of all the judges.

Shortly before and after his death rapid changes in the composition of the court again occurred, and within a few years the change was nearly complete. No one in a responsible position, and having respect for his own fame, ever assailed the inexorable logic of his great opinions. No conclusion vital to the government which was reached by the court in his day was ever overruled. If it is possible to explain the process by which the Constitution became atrophied in a few years, the explanation does not belong to this occasion. He viewed with anxiety the violence which at times marked the action of the centrifugal forces in our system, and it is evident that he feared the strife which he did not live to see. To aid in averting it he never tired of appealing to reason. His broad national doctrines, so appropriate to the provisions of the Constitution, so promotive of its well-known objects, were founded in reason. When accumulating calamities attended the decline of their influence, it was restored by arms. Now, as if the payment of a great price had increased their value, those doctrines are accepted by all the people. In the court where he so long sat they are received without envy of his fame, and applied without intentional abridgment; and the court itself again occupies its rightful position high in the public confidence and respect.

To describe his reasoning, lawyers, judges, commentators and biographers have employed all the adjectives indicative of strength or lucidity. A great lawyer who often appeared before him characterized his power of reasoning as "almost superhuman." Some of his asso-

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ciates excelled him in knowledge of the precedents, but that was of small moment in the department of international law which was so rapidly outgrowing its precedents, and of no moment at all in the department of constitutional law where there was no precedent. His illustrious achievements in the field of highest intellectual endeavor resulted from a concurrence of favoring conditions which was unusual if not unprecedented. He was strong in body, mind and purpose. He had the intellectual integrity to apply knowledge to every purpose for which it might be useful, and to accept without abatement the conclusions indicated by reason. He may have been aided by safe instincts, but he did not find the truth by chance. He knew the ways which lead to it. Extraordinary native endowments were strengthened by the study and reflection to which patriotism inclined him. More completely than any of his contemporaries he had assimilated the history of the colonies and the Confederation. Hence the irresistible passages in his opinions in which he applies those trusted tests of interpretation — the evils which were to be cast out, the objects which were to be attained. His mind was stored with lessons drawn from the experience of every nation which had ever aspired to be free, and he comprehended their demonstration that most of the crimes against liberty are committed in the name of liberty. We have no opportunity for the study of a more constant character. From youth to age, for nearly sixty years, he was an unremitting force for order, for government, for liberty regulated by law and perpetuated by the law which regulates it. He brought adequate powers to the performance of grave and unprecedented duties. In their performance he was

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aided by a bar of deserved renown. Until near the close of his career his associates on the bench were all men of ability and of ambitions befitting their position. Not only was he favored by these conditions, but his powers matured early and endured long. Forty-four years intervened between his luminous addresses in the Virginia convention and his masterful opinion in Worcester *v.* Georgia. They were remarkable years, for they were exempt at their beginning from the unripeness of youth, and at their close from the infirmities of age. In estimating his character, we find no words of mere eulogy, for it appears from abundant evidence that he had neither vice nor foible requiring a subtraction to be made from the large sum of his virtues. His life is conspicuous among those which remind us of the sublimeness of life. The value of his public services cannot now be estimated, for the course of the Constitution is not yet finished. In thirty-six opinions in cases requiring interpretation of its provisions, scarcely one of them escaped his analysis. So convincingly was their meaning unfolded, and with such felicity were the principles of interpretation defined, that it is to be doubted whether in sixty-five years a question of that character has arisen in Federal or State court to whose proper solution his learning has not contributed. Among our nation-builders he was the finisher. To those who had wrought so well in the other departments of the work he had been attached by the strongest of bonds which can unite men — companionship in danger and glory. He survived them by a generation; and with pious devotion he guarded the Constitution as the Ark of the nation's covenant, containing the treasures of the Revolution and of all our history. He was the last survivor of our great creative Triumvirate.

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Celebration at Cleveland.

Marshall Day was celebrated also at Cleveland, under the auspices of the Cleveland Bar Association, at the Chamber of Commerce, February 4, 1901, followed by a banquet. The meeting was largely attended, not only by citizens, but by the faculty and students of the University, law schools and public schools, and by a large number of the members of the Bar. At the meeting an introductory address was delivered by E. J. Blandin, Esq., President of the Cleveland Bar Association. The oration was delivered by Hampton L. Carson, Esq., of the Philadelphia Bar (author of the History of the Supreme Court of the United States), his subject being: "John Marshall in his relation to the establishment of the supremacy of the Supreme Court as an organ of constitutional interpretation."

Address of Hampton L. Carson.

This is the one hundredth anniversary of the day on which John Marshall took his seat as Chief Justice of the United States, and we have met to commemorate his virtues and his services. The ceremonies of the hour are not simply unusual; they are unprecedented. Not here alone but in the National capital, in every Federal district, in every State at centres of population, the members of our profession have paused in the midst of labor to contemplate the character of a judge whose intellectual and moral attributes lifted the magistracy of the nation to a position which has fixed the gaze of posterity and awakened the admiration of mankind. It would be idle for me to attempt to add to the many well-considered eulogies upon his character, or to present, even in

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outline, the details of his biography. It would require a volume to do justice to his career, and within the limits of a short address it is manifestly impossible to do more than glance at a single aspect of his many-sided greatness. I intend to invite your attention to *Marshall in his relation to the establishment of the Supremacy of the Supreme Court of the United States as an Organ of Constitutional Interpretation.* I ask you to view him as the Founder of our Constitutional Jurisprudence.

To us the statement of this theme seems but the utterance of a truism. We have been so long accustomed to regard him as the unrivaled head of our National Judiciary that his title to the place passes without challenge; but I propose to review the steps by which that title was established. He came upon the bench at a critical period in our history, at a time when there was a violent onslaught upon the Federal Judiciary, when the independence of his tribunal and the scope of its powers were matters of doubt; when jealous fears of Federal encroachment were rampant. He left it, thirty-five years later, in the serene conviction that the hour of peril had passed, for he had announced and illustrated certain canons of construction which have been adopted as the cardinal doctrines of the court.

The task of Marshall, to state it concisely, was "to establish justice," or, to put it in another form, to secure recognition of the final right of the judiciary to interpret and enforce the Constitution. This involved the assertion of judicial power to confine Congress and State legislatures within constitutional bounds, and especially the exercise of such power in so wise and salutary a manner as to strengthen the National Government, vindicate the independence of the judiciary, and by calm and

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incontestable logic subdue all malcontents. It required absolute fairness and infinite patience in the comparison of legislative acts with the Constitution. It called for fearless honesty in the promulgation of a judgment without regard to consequences. It needed the active exertions of a mind of the highest order to protect that paramount law which all had sworn to support.

The dispensations of Providence in behalf of our favored country, while numerous and striking, are nowhere more signally illustrated than in the series of events which secured for Marshall the highest official place and prevented his appearance in a subordinate station — a matter of the greatest moment, for a master mind requires for the full employment of its supreme energies the responsible position of chief and the most exalted rank to sustain it. It is pertinent to observe that any one of the following events, had they been ordered otherwise, would have excluded John Marshall from the bench entirely, or have deprived him of the Chief Justiceship; occurring, as they all did, within the narrow compass of six years, and his opportunities being limited to the life-time of the Federalist party.

In 1795 John Jay resigned the Chief Justiceship upon his election as Governor of New York. Had he preferred the ermine, Marshall would never have reached the highest place, as Jay lived until 1824. On Jay's resignation, William Cushing, of Massachusetts, the senior Associate Justice, was actually commissioned by Washington as his successor. Had he accepted his promotion, Marshall would again have failed of the first distinction, for Cushing remained in active service until 1810. Oliver Ellsworth became Chief Justice in March, 1796, and resigned in December, 1800, while acting as Envoy Extraor-

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dinary and Minister Plenipotentiary at Paris. Had he failed to resign, Marshall would, for a third time, have lost his opportunity, for Ellsworth lived until 1807. In 1799 James Iredell, an Associate Justice, died, and his vacant seat was offered to Marshall, who declined it. Had he accepted it, he would have been for life in the position of a subordinate. On Ellsworth's resignation, President Adams, at Marshall's own suggestion, offered the Chief Justiceship a second time to John Jay, who declined it. Had he accepted, Marshall would never have reached the bench in any position. On Jay's declination, Marshall urged the appointment of Justice Paterson, the second senior Associate. Had the President been persuaded, Marshall would for a sixth time have forfeited a chance. The suggestion was then made to President Adams by some interested friend that possibly he himself might take it. Had he yielded, the seventh and last opportunity of Marshall would have been extinguished, for with the inauguration of Jefferson his hopes of judicial preferment would have vanished forever. But Mr. Adams disclaimed personal ambition. "I have already," he wrote, "by the nomination to this office of a gentleman in full vigor of middle life, in the full habits of business, and whose reading of the science of the law is fresh in his mind, put it wholly out of my power, and, indeed, it never was in my hopes and wishes." On the 31st of January, 1801, he requested the Secretary of War "to execute the office of Secretary of State so far as to affix the seal of the United States to the inclosed commission to the present Secretary of State, John Marshall of Virginia, to be Chief Justice of the United States."

"He was born," exclaimed William Pinkney, "to be the Chief Justice of any country into which Providence should

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have cast him," and although the celebrated Maryland advocate was speaking of his intellectual and moral qualifications, yet it is plain from the preceding narrative of extraordinary events that Providence had decreed that he should be Chief Justice. In after years, John Quincy Adams said that if his father had done nothing else to deserve the approbation of his country and posterity, he might proudly claim it for this single act.

It is hard for us at this distant day to appreciate the magnitude or the difficulty of the task which confronted the Chief Justice. There were six distinct influences to be overcome — all of them hostile, most of them virulent and violent. Let us briefly review them in turn, in order properly to estimate the value of the services rendered by Marshall in his great deliverances in Marbury *v.* Madison[1] and Cohens *v.* State of Virginia.[2]

A bitter assault had been made upon Article III of the Constitution of the United States relating to the Judiciary Department, and the most violent passions had been fully aroused. Many of the most famous names in our history were vehement in their opposition, while many others were either neutral or gave to the Constitution but a lukewarm support. Elbridge Gerry, of Massachusetts, had expressed a fear that the Judicial Department would prove oppressive, and, in a pamphlet published over the signature of "A Columbian Patriot," declared: "There are no well defined limits of the judicial powers; they seem to be left as a boundless ocean that has broken over the chart of the Supreme Law-giver, 'thus far thou shalt go and no farther;' and as they cannot be comprehended by the clearest capacity or the most sagacious mind, it would be a herculean labor to attempt to describe the

[1] 1 Cranch, 137. [2] 6 Wheaton, 264.

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dangers with which they are replete." Edmund Randolph, the Governor of Virginia, who had refused to sign the Constitution, strenuously objected that there was no limitation or definition of the judicial power. George Mason, the remaining member of the Federal Convention who had refused to sign, declared that "the Judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several States." Richard Henry Lee was full of dire prophecies of disaster. Patrick Henry foresaw "the prostration of all our rights." Luther Martin pointed out how a vast and varied jurisdiction had been snatched from the State courts. In every State similar fears were expressed and the most gloomy predictions were made. Everywhere the subversion of the State governments and the loss of personal freedom were made the burden of complaint in "Observations," "Examinations," "Addresses," "Letters," "Remarks," and "Objections." It is true that Edmund Pendleton, James Madison, Alexander Hamilton, John Jay, James Wilson, Noah Webster, Tench Coxe, Alexander Contee Hanson, James Iredell, and Marshall himself, in the Virginia Convention, had replied to impassioned invective by calm and persuasive argument, but the air was still thick with the smoke of conflict and the bosom of the political sea was still heaving with emotion. But eleven years had passed since the ratification of the Constitution, and the waves of opposition still broke in angry surges at the base of the Judiciary Department.

Besides this, there were a lack of hardy support of the Judiciary Department by men of distinction, lack of courage on the part of members of the judicial staff in asserting or maintaining a position of strength and dignity,

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and in many instances an openly expressed preference for service under the States, or in other fields, all of which combined to weaken the influence of the judiciary. Such men as Edmund Pendleton of Virginia, Robert Hanson Harrison of Maryland, and Charles Cotesworth Pinckney and Edward Rutledge of South Carolina, had declined the commissions tendered them by Washington in the Supreme Court of the United States. John Rutledge of South Carolina, Thomas Johnson of Maryland, John Blair of Virginia, and Alfred Moore of North Carolina, had resigned. John Jay and Oliver Ellsworth had abandoned the office of Chief Justice after but a few years of tenure. The senior associate was unwilling to accept the responsibility attached to the head of the court, and John Jay, when asked a second time to assume the ermine, wrote under date of January 2, 1801, to President Adams as follows: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which was essential to its affording due support to the National Government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and expediency of my returning to the bench under the present system."

That such an estimate of the Supreme Court and such a despairing prophecy should be uttered by such a man as John Jay would occasion much surprise were it not a fact that one of the vices of the age was the frequent desertion by the judiciary of its own exalted functions for other branches of the service. Doubt and uncertainty as to its true position clouded its earlier years, "when the politicians — or statesmen — of that day bivouacked in the

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Chief Justiceship on their march from one political position to another."

The third influence, adverse in its results to the dignity and power of the Supreme Court, derived its force and effect from the heavy blow dealt judicial authority in the adoption of the Eleventh Amendment — following the decision in Chisholm *v.* State of Georgia.[1] It had been held that a State could be made party defendant, in any case, in the Supreme Court, at the suit of a private citizen of another State; that an action of *assumpsit* could be maintained against a State; that service by summons upon the Governor and Attorney-General of a State was a competent service; and further, that unless the State appeared, or showed cause to the contrary, a judgment by default would be entered. These views were dissented from by but a single judge, and the decision, as soon as pronounced, created much excitement and fanned anti-Federal sentiment into a flame. Every State was burdened with heavy debts. Several had been sued, and the legislature of Georgia responded by a statute denouncing the penalty of death against any one who should presume to enforce any process upon the judgment within her jurisdiction. The decision was pronounced upon the 18th of February, 1793; two days afterwards the Eleventh Amendment to the Constitution was proposed to Congress, and formally acted upon by that body in the following December. Its adoption by the States was announced in January, 1798. The case had sounded its first clear trumpet note by the Court in behalf of National power. It had proved a summons to battle, in which the Court had lost, and Marshall was obliged to face the task of recovering prestige.

[1] 2 Dallas, 419.

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The fourth antagonistic force was both formidable and persistent. The moment that Jefferson came into power a systematic and well organized attack was made upon the Federal judiciary, which was regarded as a rampart behind which the hated Federalists had entrenched themselves. The act establishing separate Circuit courts was repealed after a long and acrimonious debate in Congress, judges appointed and confirmed for life were driven from their seats notwithstanding the constitutional argument that was made in opposition, and in order to prevent the new Chief Justice from interfering with these arrangements the shrewd legislative artifice was resorted to, under the dictation of the President, of suspending the sessions of the Supreme Court for a period of fourteen months by abolishing the August term. This congressional assault was followed by the impeachment and conviction of Pickering, the United States District Judge in New Hampshire, and the impeachment of Associate Justice Chase, upon whose acquittal, John Randolph, in a rage, submitted as an amendment to the Constitution that "The judges of the Supreme Court, and all other courts of the United States, shall be removed by the President on the joint address of both Houses of Congress." But he could not command sufficient support. The bitterness of Jefferson had not died out when, fifteen years later, he wrote to Ritchie: "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric."

A fifth influence to be overcome was derived from the prevalence of certain philosophic views of the relation of the co-ordinate departments of the government, which militated against the judicial control of the legislature.

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It was argued that the legislature had at least an equal right with the judiciary to put a construction on the Constitution, that neither of them was infallible, and that neither ought to be required to surrender its judgment to the other. If there was a difference of opinion as to the constitutionality of a particular law, the organ whose business it was first to decide on the subject had a right to have its judgment treated with respect, and it was vain to say that the legislature would be the aggressor. These views hung like dark clouds about the pathway of the judiciary, and, strange to say, wore their most formidable aspect as late as 1825 in an opinion by Justice Gibson of the Supreme Court of Pennsylvania, when they finally disappeared in the sunburst of Marshall's overwhelming demonstration.

The last, and, from a legal point of view, the most formidable objection, lay in the comparative novelty of the idea of judicial control of the law-making power.

The germ of the doctrine appeared in the case of Holmes *v.* Walton,[1] argued in 1779 before Chief Justice David Brearly. In speaking of this decision, Gouverneur Morris wrote in 1785: "In New Jersey the judges pronounced a law unconstitutional and void. Surely no good citizen can wish to see the point decided in the tribunals in Pennsylvania. Such power in judges is dangerous, but unless it somewhere exists, the time employed in framing a bill of rights and form of government was merely thrown away." Prior to this remark, the case of Commonwealth *v.* Caton *et al.*[2] had come before the Court of Appeals in Virginia in 1782, while Rutgers *v.* Wad-

[1] Referred to in State *v.* Parkhurst, 4 Halstead (N. J.), 444.
[2] 4 Call (Va.), 1.

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dington[1] had been decided in New York in 1784, and Trevett *v.* Weeden[2] in Rhode Island in 1786. In the Virginia case, George Wythe, subsequently a member of the Federal Convention, declared: "If the whole legislature (an event to be deprecated) should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united efforts at my seat in this tribunal, and, pointing to the Constitution, will say to them, 'Here is the limit of your authority, and hither shall you go, but no further.'" These views were again declared in several later cases. Without going into details, it is clear beyond controversy that when the Federal Convention met in 1787 for the purpose of framing a Constitution for the United States, the idea of controlling the legislature through the judiciary was familiar to its leading members. It had been asserted in New Jersey, Virginia, New York, Rhode Island and North Carolina. The members of the Convention who had, either as counsel or judges, considered such a question, were among the most prominent on the floor. There were, from Virginia, George Wythe, John Blair, Edmund Randolph and George Mason; from New Jersey, David Brearly; from New York, Alexander Hamilton; from North Carolina, Richard Dobbs Spaight, informed specially by his correspondence with Iredell, of counsel in the case of Bayard *v.* Singleton.[3]

As to the views of the members of the Federal Convention, my time does not permit me to go into the language of the debates, but no careful student of Madison's Notes,

[1] Hamilton's Works, Vol. 7, 197, Edit. of J. C. Hamilton.

[2] Pamphlet of J. R. Varnum, Providence, 1787.

[3] 1 Martin (N. C.), 42.

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or of the Journal of the Convention, can fail to reach the conclusion that it was generally admitted by the delegates that the court would have the power under the Constitution, without any express gift. Such a power was commented upon with approval in the Convention by Gerry, Morris, James Wilson, Mason and Luther Martin. It was opposed by Mercer of Maryland and Dickinson of Delaware.

In the State conventions the matter was discussed in Connecticut by Ellsworth, who called the judiciary "a constitutional check;" in North Carolina by Davies, in Pennsylvania by Wilson, and in Virginia by John Marshall, Edmund Randolph and Patrick Henry, the latter, while a decided opponent of the Constitution, being an earnest advocate of the independence of the judiciary.

In the *Federalist*[1] the independence of the judiciary was elaborately discussed, but the existence of the power to pass on questions of constitutionality was assumed.

The Judiciary Act of 24th of September, 1789, which regulated the appellate jurisdiction of the Supreme Court — a statute which it is no exaggeration to term a veritable bond of union — contains a clear legislative expression of the views of the First Congress under the Constitution that the questions referred to are judicial questions, and that the determination of them belongs to the Supreme Court.

All this is very plain to us at the present day, but at that time nothing was settled. There was an inveterate conviction on the part of men, many of whom had been trained in the Temple, that the legislative branch of the government was originally omnipotent, and had been reduced by the Constitution to a position of co-ordination,

[1] Nos. 78 and 80.

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which involved no inferiority. It was with slow, timid and halting footsteps that a determination was approached.

The first case before the Supreme Court which touched the question illustrates the reluctance of the judges to assert their power. The case is Hayburn's.[1] Congress had directed the judges to act as commissioners in the settlement of pension claims, subject to review by the Secretary of War and by Congress. Indecision characterized the action of the bench. In Yale Todd's[2] case there was no opinion, but a determination which involved the abstract exercise of the power. In Calder *v.* Bull,[3] Mr. Justice Chase expressed doubt as to the jurisdiction of the court to determine that any law of a State legislature contrary to the Constitution of a State was void, and declined to express an opinion whether the Supreme Court could declare void an act of Congress contrary to the Federal Constitution. In Cooper *v.* Telfair[4] the same judge said: "It is a general opinion, indeed it is expressly admitted by all this bar, and some of the judges have, individually, in the circuits, decided that the Supreme Court can declare an act of Congress to be unconstitutional, and therefore invalid; but there is no adjudication of the Supreme Court itself upon the point. I agree, however, in the general sentiment."

By the foregoing analysis the political and legal phenomena attending the advent of John Marshall are at least suggested. Enough had been said to show that a crisis had arrived. Our salvation as a nation called for

[1] 2 Dallas, 409.

[2] Note to United States v. Ferreira, 13 Howard, 40–52.

[3] 3 Dallas, 386.

[4] 4 Dallas, 194.

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a judicial utterance from a mind of equal powers of ratiocination with those of Newton and La Place, in an argument marked by the precision and certainty of a mathematical demonstration. The judiciary department had been thrust by downward pressure below its proper level; it was still sinking, and if depressed much further would be drawn by suction into rapacious sands. Marshall by sheer force of intellect underpinned and then uplifted it to a plane of independence beyond the reach of the executive and legislative branches, there to remain as a controlling power under the Constitution. There was no grinding of the screw, vast though the exertion, but his mind acted like a telluric force upheaving a continent slowly but surely above the level of the devouring sea. His opportunity came in Marbury *v.* Madison.[1]

In the December term, 1801, Charles Lee, late Attorney-General of the United States, moved for a rule to show cause why a *mandamus* should not issue addressed to Madison, then Secretary of State, commanding him to deliver a commission to Marbury, whom President Adams, before the expiration of his term, had nominated as justice of the peace for the District of Columbia. A commission had been filled up, signed by the President, and sealed with the seal of the United States, but had not been delivered when Mr. Jefferson came into office. Acting on the idea that the appointment was incomplete and void so long as the commission remained undelivered, Jefferson countermanded its issue. The application made to the Supreme Court was for the exercise of its original jurisdiction under the terms of the Judiciary Act, and the main question undoubtedly was whether such a writ could issue from the Supreme Court under the gift of a

[1] 1 Cranch, 137.

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jurisdiction by Congress in direct violation of the terms of the Constitution in distributing original and appellate authority. The Chief Justice in the course of his opinion said:

"If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance. . . . The powers of the legislature are defined and limited; and, that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it, or that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. . . . If an act of the legislature repug-

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nant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthow in fact what was established in theory, and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

From this remorseless logic there could be no escape. It would have been easier to challenge a proposition of Euclid. Political opponents stormed at it in impotent rage, and occasionally a few atrabilious critics denounced it as mere *obiter dictum;* but it stood as an adamantine piece of reasoning, an invincible buttress of nationality, like the pyramid of Cheops, unshaken by the barking of jackals at its base. It settled the principle that it is not only the right but the duty of the judiciary to pass upon

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the constitutionality of congressional enactments, and declare them void if in conflict with the fundamental law. It established the supremacy of the court in matters of constitutional construction.

The next step was to vindicate the appellate jurisdiction of the Court under the twenty-fifth section of the Judiciary Act.

In 1816 a most important matter called for determination, presenting an instance of collision between the judicial powers of the Union and one of the greatest States on a point the most delicate and difficult to be adjusted. The Constitution of the United States had not in terms granted to the Supreme Court appellate power over courts of the States, and although silently acquiesced in at an early day, this jurisdiction was finally not only seriously questioned but absolutely denied by the State of Virginia. It required a repetition of instances, in which the Supreme Court vindicated its authority within certain well-defined limits, to convince the country that this power existed.

The twenty-fifth section of the Judiciary Act of 1789 had provided that—

"A final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Consti-

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tution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."

This act was a triumph of Federalist-centralization, and was a cession of power to the Supreme Court of more consequence to the States than the "necessary and proper" clause itself. Its critics believed that it had been dictated by a wish to make the State judiciaries inferior to the courts of the central government, because the powers of the General Government might be "drawn in question" in many ways and on many occasions. Mr. Henry Adams asserts that Chief Justice Marshall achieved one of his great victories by causing Justice Story, a Republican raised to the bench in 1811 for the purpose of contesting his authority, to pronounce the opinion of the court in the case of Martin *v.* Hunter's Lessee,[1] by which the position of the Virginia Court of Appeals was overruled.

The opinion of Mr. Justice Story, which is the first constitutional judgment ever delivered by him, differs from the most of his opinions in the fact that it is a closely-reasoned argument without citation of authority. It displays many of the peculiar merits of the best judgments of Marshall — compactness of fibre and closeness of logic. It develops the relations of the States to the Federal Government, and establishes that although their sovereign authority is only impaired so far as it is ceded, yet that the Constitution does not operate to create a mere confederation and aggregation of separate sovereignties, but

[1] 1 Wheaton, 304.

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contains in itself paramount and supreme powers surrendered by the States and the people for the common and equal benefit of all over whom this government extends,— and that among the powers thus ceded is the appellate jurisdiction of the Supreme Court over all cases enumerated in the clause vesting the judicial power.

The entire subject, though fully discussed, was not finally settled until the case of Cohens *v.* Virginia,[1] when the decisive utterance was made by Marshall himself.

The case had originated in a State court; it had been sought to carry it to the highest State court; the State of Virginia was a party, and a writ of error had been issued to bring the matter before the Supreme Court of the United States for review. The appellate jurisdiction of the court was denied. It was argued that the Constitution never contemplated giving jurisdiction to the Federal courts in cases between a State and its own citizens. Moreover, it was further contended that there was nothing in the Constitution that indicated a design to make the State judiciaries subordinate to the judiciary of the United States; that the judiciary of every government must judge of its own jurisdiction; that the States were not to be denied the power of judging of their own laws; that as their legislatures were subject to no negative, so their judgments were subject to no appeal.

The Chief Justice recognized the magnitude of the questions, and said that they vitally affected the Union. "They exclude the inquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They

[1] 6 Wheaton, 264.

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maintain that the Nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the Nation; but that this power may be exercised in the last resort by the courts of every State in the Union. That the Constitution, laws and treaties may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. . . .

"If such be the Constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of the court to say so; and to perform that task which the American people have assigned to the judicial department. . . .

"When we consider the situation of the government of the Union and of a State in relation to each other; the nature of our Constitution; the subordination of the State governments to that Constitution; the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States is confided to the judicial department,— are we at liberty to insert in this general grant an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think a case arising under the Constitution or laws of the United States is cognizable in

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the courts of the Union whoever may be the parties to that case. . . .

"If the Constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the Constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to all cases arising under the Constitution and laws? . . .

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

What intellectual strength, what far-seeing statesmanship, what superb moral courage are here displayed! Every mind assented to his logic, every heart was thrilled by his intrepidity, and every eye was transfixed by the white

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light of judicial rectitude which shone in every sentence. The effect was decisive. The result has been acquiesced in by the country since that time without a murmur. The jurisdiction of the Court had at last been secured, vindicated and sustained. Upon these cases, as upon pillars of enduring strength, will forever rest the supremacy of the Supreme Court.

But having established his jurisdiction, it remained for the Chief Justice to define judicially the powers and develop the resources and hidden treasures of the Constitution, demonstrate its capacity, and adapt them to new relations of social life. He considered many of the most important powers of Congress; he established and sustained the supremacy of the United States; their right as a creditor to priority of payment; their right to institute and protect an incorporated bank; to lay a general and indefinite embargo; to levy taxes; to pre-empt Indian lands; to control the State militia; to promote internal improvements; to regulate commerce with foreign nations and among the States; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy. He dealt with a mass of implied powers incidental to the express powers of Congress; gave life to the clause which authorized the employment of necessary and proper instruments; enforced the constitutional restrictions upon powers of the States; struck down pretentious efforts to emit bills of credit, to pass *ex post facto* laws, to control or impede the exercise of Federal powers, to impair the obligations of contracts, to tax national agencies, to exercise power over ceded territory, to cripple commerce, and to defy the lawful decrees of the Federal courts. He upheld the paramount obligations of treaties, defined the law of treason, developed the ad-

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miralty and maritime jurisdiction, illustrated the law of prize, extended the application of the principles of commercial law, and placed the law of trusts and charities upon a stable basis. He protected the States in the exercise of their lawful powers, in their exclusive right to interpret their own Constitutions and local laws, in their freedom from molestation under the Fifth and Eleventh Amendments, in their right to levy taxes upon the creatures of their own sovereignty. In United States *v.* Judge Peters,[1] in the trial of Aaron Burr, in Fletcher *v.* Peck,[2] in the case of The Nereide,[3] in M'Culloch *v.* The State of Maryland,[4] in Trustees of Dartmouth College *v.* Woodward,[5] in Sturges *v.* Crowninshield,[6] in Osborn *v.* Bank of the United States,[7] in Gibbons *v.* Ogden,[8] in Willson *v.* Blackbird Creek Marsh Company,[9] in Brown *v.* The State of Maryland,[10] in Craig *v.* The State of Missouri,[11] in Barron *v.* The Mayor of Baltimore,[12] in Ogden *v.* Saunders,[13] and in Worcester *v.* The State of Georgia,[14] we recognize a magnificent range of adjudications which bears to our constitutional jurisprudence the relative strength and majesty of the Rocky Mountains to our physical geography.

No words that we can use to-day can equal the plaudits of his contemporaries. Pinkney exclaimed: "I meditate with exultation, not fear, upon the proud spectacle of a peaceful review of these conflicting sovereign claims by this more than Amphictyonic Council. I see a pledge of the immortality of the Union, of a perpetuity of na-

[1] 5 Cranch, 115.
[2] 6 Cranch, 87.
[3] 9 Cranch, 389.
[4] 4 Wheaton, 316.
[5] 4 Wheaton, 518.
[6] 4 Wheaton, 122.
[7] 9 Wheaton, 739.
[8] 9 Wheaton, 1.
[9] 2 Peters, 245.
[10] 12 Wheaton, 419.
[11] 4 Peters, 410.
[12] 7 Peters, 243.
[13] 12 Wheaton, 213.
[14] 6 Peters, 515.

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tional strength and glory increasing and brightening with age — of concord at home and reputation abroad." Charles Carroll, of Carrollton, the last survivor of the signers of the Declaration of Independence, and then upon the verge of the grave, wrote to Judge Peters: "I consider the Supreme Court of the United States as the strongest guardian of the powers of Congress and the rights of the people. As long as that court is composed of learned, upright and intrepid judges, the Union will be preserved and the administration of justice will be safe in this extended and extending empire." Horace Binney declared: "What, sir, is the Supreme Court of the United States? It is the august representative of the wisdom and justice and conscience of this whole people in the exposition of their Constitution and laws. It is the peaceful and venerable arbitrator between the citizens in all questions touching the extent and sway of constitutional power. It is the great moral substitute for force in controversies between the people, the States and the Union." Henry Clay pronounced the Supreme Court to be "one of the few great conservative elements of the Government." Webster spoke of it as "the great practical expounder of the powers of the Government," and with awful solemnity declared, "No conviction is deeper in my mind than that the maintenance of the judicial power is essential and indispensable to the very being of this Government. The Constitution without it would be no Constitution — the Government no Government. I am deeply sensible, too, and, as I think, every man must be whose eyes have been open to what has passed around him for the last twenty years, that the judicial power is the protecting power of the government. Its position is upon the outer wall. From the

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very nature of things, and the frame of the Constitution, it forms the point at which our different systems of government meet in collision, when collision unhappily exists. By the absolute necessity of the case, the members of the Supreme Court become judges of the extent of constitutional powers. They are, if I may so call them, the great arbitrators between contending sovereignties." De Tocqueville said that "a more imposing judicial power was never constituted by any people." Lord Brougham did not hesitate to pronounce that "the power of the judiciary to prevent either the State legislators or Congress from overstepping the limits of the Constitution is the very greatest refinement in social policy to which any state of circumstances has ever given rise, or to which any age has ever given birth." Sir Henry Sumner Maine spoke of it as "a unique creation of the founders of the Constitution," while Bryce, paraphrasing an expression of the Civil law, calls it "the living voice of the Constitution."

The title of the Court to the veneration and esteem of mankind does not rest alone on the peculiar character of its jurisdiction, or its powers, the wisdom with which they have been exercised, the learning and splendor of its bar, or the lofty character of the questions discussed. It rests largely upon the reputation of its judges for purity, courage and ability — and of these John Marshall was confessedly first. He ranks with the greatest jurists of the Anglo-Saxon race. He is the peer of Hale and Hardwicke, and Mansfield and Stowell — nay, in the powers of constructive intellect, he was far greater than these. I would not abate one tithe from the just fame or pluck a single leaf from the laurels of Bushrod Washington, Joseph Story, Brockholst Livingston or William

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Johnson, nor would I undervalue the support given by the tremendous intellects of Pinkney, Webster, Dexter, Emmet, Wirt or Binney and Sergeant at the bar. But just as Washington, who had the aid of Greene, Wayne, Knox, Lafayette, or Steuben, will always command the largest share of praise for the military conduct of the Revolution, so will John Marshall, the Chief Justice at the critical and formative stage of our jurisprudence, command to the end of time the largest measure of reverence. His master mind dominated his tribunal, his world-wide reputation awakened admiration, his resistless logic coerced assent, his crushing weight of reason annihilated opposition. His authoritative judgments, his spotless rectitude, his unequaled term of service, the matchless veneration for his character, the unrivaled authority of his name, mark him as the undisputed head of the supremest of earthly tribunals — the foremost of our national jurists — the judge whose conduct "justified the wisdom of the Constitution, and reconciled the jealousy of Freedom to the Independence of the Judiciary."

The career of Marshall was indispensable to the existence of this government. Under Providence, he made it possible for it to become what it is to-day. Had a weaker mind, or one of different qualities, occupied the chair of Chief Justice from 1801 to 1835, the Republic would have failed in its development, and the Constitution would have been a mass of unexercised fat, instead of a living organism of nerve and sinew. His peculiar traits were those of a lawyer, statesman and patriot, which in their triple union completed the frame of a great constitutional judge and raised the government from a doubtful experiment to an assured success, and established it in the affections and confidence of the people.

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He was fortunate in his opportunities; he was great in his achievements, and applied his faculties in the creation of a system of jurisprudence which takes its place among the admired intellectual productions of the world. He reared a solid and magnificent structure destined to overshadow, but not oppress, the less elevated and less ambitious systems of justice of the several States. He accomplished his ends through the moral force which belonged to the independent position of the judiciary. With no direct control over the sword or purse of the nation, with no armed force behind him, supported by no party obedient to his behests, with no patronage to distribute, and with no appropriations to corrupt a crowd of camp followers, removed from the reach of partisan influences and protected by his life tenure from sudden gusts of passion, he wrought on in the quiet performance of his duty, without fear or favor, and relied for the results upon the reverence of the people for the majestic and final utterance of the Law, with a proud consciousness of his authority. He regarded himself as a high servant of Heaven, engaged in the noblest practical mission on earth, intrusted with the awful power of sitting in final judgment upon the rights of States and the liberties of individuals in the great Court of last resort under the Constitution of the United States.

The Supreme Court, under his guidance, has become the strength and glory of the Republic. The decisions of that Court, and the principles which they embody, constitute the foundations of our institutions — foundations which neither the earthquake of revolution can shake, nor the eruptive fires of civil war destroy. So long as that Court maintains its lofty teachings, so long as the maxims of interpretation and the principles which

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underlie its work are true to the landmarks established by the great Chief Justice, so long will a pledge exist that the liberties of America will prove immortal.

Celebration at Toledo.

The Bar Association of the City of Toledo also observed Marshall Day. At the instance of the Association all the courts adjourned in honor of the event, and in order to attend the celebration.

The petition of the bar to the Court of Common Pleas was presented by James M. Ritchie, and to the Circuit Court by I. N. Huntsberger, President of the Toledo Bar Association. The exercises were held in Memorial Hall, Toledo, in the evening of February 4, 1901, and were presided over by Mr. Huntsberger, who introduced as the orator of the evening John F. Follett of Cincinnati, who delivered an address on the life, character and work of Chief Justice Marshall. The address, omitting the biographical details and extracts from Marshall's opinions already given in preceding addresses, is as follows:

Address of John F. Follett.

The kind invitation to address the Toledo Bar Association at the first celebration of the day upon which John Marshall took his seat as Chief Justice of the Supreme Court of the United States I regard as an honor, for which I desire to express my sincere gratitude.

The suggestion by the American Bar Association of the proper observance of this day was most timely and fitting. The great work performed by Chief Justice Marshall in establishing, preserving and limiting consti-

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tutional rights and obligations has placed the whole body of our people under such deep obligation to him, and especially the bench and bar, presumed to be in a special sense the defenders and protectors of the people's rights, and to whom he pointed out so clearly the true paths which should be followed in constitutional construction, that now no honest and unselfish member of our profession need go astray, has so contributed to the happiness and welfare of all our people as to demand some proper expression of our grateful remembrance, and this day has been set apart for that purpose.

It is difficult, indeed impossible, for us to realize and properly appreciate the situation of affairs in this country one hundred years ago when Marshall first took his seat as Chief Justice. Judge Story thus speaks of it:

"The termination of the Revolutionary war left the country impoverished and exhausted by its expenditures, and the national finances at a low state of depression. Powers of Congress under the Confederation, which, even during the war, were often prostrated by the neglect of a single State to enforce them, became in the ensuing peace utterly relaxed and inefficient.

"Credit, private as well as public, was destroyed. Agriculture and commerce were crippled. The delicate relation of debtor and creditor became daily more and more embarrassed and embarrassing; and, as is usual upon such occasions, every sort of expedient was resorted to by popular leaders, as well as by men of desperate fortunes, to inflame the public mind, and to bring into odium those who labored to preserve the public faith, and to establish a more energetic government. The whole country was soon divided into two great parties, the one of which endeavored to put an end to the public evils by the estab-

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lishment of a government over the Union, which should be adequate to all its exigencies and act directly on the people; the other was devoted to State authority, jealous of all Federal influence, and determined at every hazard to resist its increase."

The Articles of Confederation proved to be of little value for the unification and strengthening of the colonies in an aggregate capacity, and wholly failed of the accomplishment of the object sought. These were followed by the adoption of the Constitution, the leading and most essential provisions of which had not, at the time Marshall went upon the bench, been construed by the Supreme Court. Leading and influential men in public life, as well as members of the bar, and the State courts, were diametrically opposed upon questions arising upon the construction of the several provisions of the Constitution.

It is said, and I think truly, that when the Almighty has a great work to accomplish He provides proper and suitable agents for its accomplishment, and in all history no stronger proof has been furnished of the entire accuracy of this saying than that found in the gaining of our independence, and in the formation and establishment and maintenance of our government, truly described as "a government of the people, by the people and for the people." Jefferson, the author of the Declaration of Independence; Washington, the leader of our forces; Madison, the chief instrumentality in the formation and adoption of our Constitution; and Marshall, the great interpreter and preserver of that Constitution. What a galaxy of names! And among them all none is greater, wiser or truer to his country and to humanity than Marshall. . . .

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I know of no character in history that I would sooner select as a model than that of John Marshall. In early life his rugged, robust nature, the kindness and geniality of his disposition, his fondness for outdoor sport and athletic exercises, made him the leader of his associates and play-fellows. In the home circle he was a kind, affectionate and dutiful son and brother, and his married life was characterized by constant and sincere affection for his wife and children and by singular devotion to their happiness and welfare. His ardent affection for his wife, who was a great sufferer from nervousness and insomnia, was singularly manifested by his constant watchfulness to prevent, so far as possible, any noise or disturbance that could interfere with her rest. His wife died a few years before his death, and it is said of him that scarcely a night after her death did he fail to spend hours in quiet tearful communion with her. He said of her, "I have lost her, and with her have lost the solace of my life. Yet she remains still the companion of my retired hours, still occupies my inmost bosom. When alone and unemployed my mind still recurs to her. More than a thousand times since the 25th of December, 1831, have I repeated to myself the beautiful lines written by General Burgoyne, under a similar affliction, substituting 'Mary' for 'Anna:'

"Encompassed in an angel's frame
An angel's virtues lay;
Too soon did Heaven assert its claim
And take its own away.
My Mary's worth, my Mary's charms,
Can never more return.
What now shall fill these widowed arms?
Ah! me, my Mary's urn.
Ah! me, ah! me, my Mary's urn."

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His genial nature and good temper were of great benefit to the soldiers who were in winter quarters with him at Valley Forge, and one of them said:

"He was the best tempered man I ever knew. During his sufferings, nothing discouraged, nothing disturbed him. If he had only bread to eat, it was just as well; if only meat, it made no difference. If any of the officers murmured at their deprivation, he would shame them by good-natured raillery, or encourage them by his own exuberance of spirits. He was an excellent companion and idolized by the soldiers and his brother officers, whose gloomy hours were enlivened by his inexhaustible fund of anecdotes."

He was always gentle, courteous and deferential to women. His dress was always plain and simple, and his intercourse with men, in all the walks of life, genial and courteous.

Almost immediately upon Marshall's admission to the bar his success was assured, and he removed to Richmond, where in his practice he encountered some of the greatest lawyers of that or any other age. His strength as an advocate, whether at the bar, or in the discussion of political questions in the legislature of Virginia, in the Constitutional Convention called to ratify the National Constitution, in Congress, or in the meetings of citizens called to consider great and important questions affecting the public, was equal to that of any of the great men with whom he was brought in contact.

An element which materially entered into and contributed greatly to the influence and power of Marshall was his strict integrity and unselfishness. He never permitted personal considerations or self-interest to stand

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as an obstacle in the way of the performance of a known duty. This element of his character is well expressed by himself during the trial for treason of Aaron Burr. Before entering upon that trial he knew that the National administration, as well as a large mass of the people of the country, believed that Burr was guilty of the crime charged and that he ought to be punished therefor. He also knew that Burr had killed Hamilton, who was one of his dearest and most intimate friends, and he looked upon Burr as a murderer, and yet he did not hesitate to define treason in such a way as to permit him to go at liberty and unpunished. In the course of that trial he said:

"That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case, if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

The actuating principle of his life was manifestly duty and conscience first, expediency never, unless his conscience approved and duty, as he saw it, harmonized. In the performance of all his duties during his long and active life he never inquired which is the popular side, and never shaped his conduct so as to win popular applause; but when, after careful examination of any ques-

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tion, his own judgment indicated what his course should be, he invariably pursued that course. Where in human history can we find a character more truly grand and noble, and may not we, the citizens of this proud and happy country, truly exult in the fact that this character left its impress so indelibly marked upon our government and its institutions as to have been a most prolific dispenser of blessings during the century that has elapsed since he became Chief Justice? . . .

In the brief space of an address it would be impossible to do more than briefly indicate the matters which to consider properly would require volumes. I trust that some suitable and competent person may undertake the work of giving to the world a proper biography of Marshall, for such a work would be invaluable to the public at large, and especially to the bench and bar.

At the age of eighteen he entered fully into the spirit of the patriotic colonists, drilling and preparing for service the men in his own neighborhood, and entering the service upon the first opportunity and continuing in that service through all its hardships and privations whenever he was needed, until the surrender of Cornwallis practically ended the war. His work in the Virginia legislature, of which he was a member for several years, which contributed very largely to the establishment of order and the adoption of our Constitution and the settlement of many questions of vital importance to the country, I can but call to your attention.

His work as a member of the mission to France, where, associated with Gerry and Pinckney, he illustrated his ability to cope successfully with as astute an opponent

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as Talleyrand and to retire from the contest with all the honors upon his side in the field of diplomacy, would of itself furnish a rich theme for the limits of an address. The appreciation of his services by his countrymen was signally manifested by the splendid reception accorded him on his return from Paris, in the course of which reception there was for the first time given to the world as the sentiment of our people, as one of the maxims now so frequently used by us, "Millions for defense, but not one cent for tribute." Nor shall I now stop to speak of his work as a statesman and diplomat during the brief period he occupied the position of Secretary of State, and in which he showed his wonderful ability in the letter written by him to Mr. King, then Minister to England. Nor can I now do more than call your attention to his work as a biographer in writing the Life of Washington, and shall only refer you to that work as evidence of his ability and fairness as an author.

Great, signally great, though he was as citizen, soldier, lawyer, diplomat, author, and statesman, he was even greater as judge. "He was born," said William Pinkney, "to be the Chief Justice of any country into which Providence should have cast him."

When Marshall entered upon his duties as Chief Justice, but two cases involving constitutional law had been decided by that court. Constitutional government was then for the first time being tried, and the extent and limits of its powers in each department were subjects of warm, if not bitter, discussion and wholly unsettled. No precedents could be found and rules of interpretation had to be formulated. While Marshall was Chief Justice fifty-one decisions were announced and reported by that court on the subject of the Federal Constitution.

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Thirty-four of those cases, and by far the most important, were decided by the Chief Justice, and not one of those decisions has been overruled by the Supreme Court of the United States. The basic idea upon which these decisions are founded is that the people of this country are sovereign, and that the grants of power made by them to each department of the government are sovereign grants, limited to the terms of the grant and the powers directly conferred, or such as are incidental and necessary to carry into effect the powers conferred. Against such construction were arrayed those who contended that the States in their State capacity were equally sovereign, and that in case of conflict National sovereignty must yield to State sovereignty. To this contention Marshall replied that the sovereignty of both the States and General Government rested in the people, and that when the people in their sovereign capacity declared that "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America," that delegation of power within the scope of the terms by which it was granted was supreme, and that to the Supreme Court of the United States was granted the ultimate determination of all questions arising under that Constitution, and as to the existence and scope of those powers, whenever the same were called in question.

In the case of Marbury *v.* Madison he said:

"That the people have an original right to establish, for their future government, such principles as in their opinion shall most conduce to their own happiness, is the basis

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on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed is supreme and can seldom act, they are designed to be permanent.

"This original and supreme will organizes the government and assigns to different departments their respective powers."

This admirable and comprehensive definition of the powers conferred by the Constitution was more elaborately and fully expressed in his opinion in the case of M'Culloch *v.* The State of Maryland *et al.*

These two cases well illustrate the clearness, simplicity and conclusiveness of the reasoning of Marshall upon the proposition as to what the Constitution is and its binding force upon all subjects and people embraced within its terms. Need I apologize for a quotation from the case of Loughborough *v.* Blake to illustrate with what clearness and precision he applied the provisions of the Constitution?

"The eighth section of the article gives to Congress the 'power to lay and collect taxes, duties, imposts and excises,' for the purposes thereinafter mentioned. This branch is general, without limitation as to place. It consequently extends to all places over which the government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are, 'that all duties, imposts and excises shall be uniform throughout the United States.' It will not be contended that the modification of the power extends to places to which the power itself does not extend.

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The power, then, to lay and collect duties, imposts and excises may be exercised and must be exercised throughout the United States. Does this term designate the whole or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great Republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties and excises should be observed in the one than the other. Since, then, the power to lay and collect duties, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

Did time permit I would be glad to refer to and quote from his lucid and convincing opinions in many other cases, notably Brown *v.* The State of Maryland; Cohens *v.* The State of Virginia; Fletcher *v.* Peck; Gibbons *v.* Ogden, and Dartmouth College *v.* Woodward, in each of which was hotly contested by eminent lawyers the right of the Supreme Court to annul an act of the State legislature violative of the Constitution of the United States, and also the right of the Supreme Court of the United States to reverse a judgment of the court of last resort within a State. The unerring sagacity, great ability and inflexible determination of Marshall to protect the people in the enjoyment of their rights, and to protect them from any encroachment upon the same from any and all sources, and to preserve those rights, and to confine those

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authorized to exercise any and all rights delegated by the Constitution strictly within the limits of the powers granted, has been the chief source from which our country has derived its greatness, happiness and prosperity.

The decisions of the great Chief Justice during his long service upon the bench were clear, cogent and conclusive, whatever might be the question involved for determination. Although associated with him upon the bench were a number of men who, during their service there, immortalized themselves as judges, it is nevertheless true that Marshall, especially in the determination of constitutional questions, was practically the court. Mr. Justice Story, who next to Marshall was at that time the greatest judge associated with him upon the bench, in an article contributed by him for *The North American Review* said:

"We resume the subject of the constitutional labors of Chief Justice Marshall. We emphatically say of Chief Justice Marshall. For though we would not be unjust to those learned gentlemen who have from time to time been his associates upon the bench, we are quite sure they would be ready to admit, what the public universally believe, that his master mind has presided in their deliberations, and given to the results a cogency of reasoning, a depth of remark, a persuasiveness of argument, a clearness and elaboration of illustration, an elevation and comprehensiveness of conclusion, to which none others offer a parallel. Few decisions upon constitutional questions have been made in which he has not delivered the opinion of the court; and in those few the duty devolved upon others to their own regret, either because he did not sit in the case, or from motives of delicacy abstained from taking an active part."

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During his long term upon the bench he was with the minority of the court in the decision of but one case and that the case of Ogden *v.* Saunders, and there are few good lawyers of the present day who will not say that in that case the opinion of the minority should have prevailed. No higher encomium could be uttered of any man than that now universally bestowed upon him, especially by the bench and bar, that, as pioneer jurist in the field of constitutional law, the paths marked out by him were always straight, and in his decisions there was no semblance of error. It has been truly said of him, "He found the Constitution paper, and he made it power; he found it a skeleton, and clothed it with flesh and blood." What greater honor could any man desire than to be able to say, as Marshall could, compare the Supreme Court of the United States as it was when I took my seat and when I left it. Let the intelligent judgment of any man answer the question, why the difference? Well might Adams say, as he did to a son of the Chief Justice, that "this gift of John Marshall to the people of the United States was the proudest act of his life."

Gladstone declared that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." And we may well say that this is a great utterance of a great man; but when this declaration was made our Constitution had been vitalized and its immortality assured by the great Chief Justice providentially furnished to us for that purpose. So long as this Constitution remains and our Supreme Court continues in its interpretation of that Constitution to follow in the footsteps of John Marshall, we need have no fears for the future, and our Nation will continue to

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be, as in the past, the guide of those desiring and loving liberty, and the beacon-light of oppressed humanity.

May we not hope that "Marshall Day" will remain with us as a means of teaching our people who Marshall is, what he was, and that the best and surest way of manifesting our appreciation of him is by emulating his example and work?

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STATE OF INDIANA.

Marshall Day was observed in Indiana under the auspices of the Indiana State Bar Association. To that end the Association held a meeting in Indianapolis on February 4, 1901, Edwin P. Hammond, President of the Association, presiding. Mr. Hammond said:

Address of E. P. Hammond.

We have assembled to celebrate the centennial anniversary of the ascension of John Marshall to the Supreme Court of the United States as Chief Justice. Disappointments are seldom as serious as they are first taken to be, and so it is on this occasion. We had expected General John C. Black of Illinois with us to deliver an oration, but at a very late hour we were advised that, on account of sickness, he could not be here. His place, however, has been well supplied, and you will hear an oration that will do justice, as far as justice can be done by one man, to so great a man as John Marshall, in the oration which you will hear this afternoon. I have the pleasure of introducing to you Honorable William A. Ketcham.

The address of William A. Ketcham, except so far as relates to biographical matters and Marshall's public career prior to his appointment as Chief Justice, and omitting familiar extracts from leading cases, is as follows:

Address of William A. Ketcham.

To-day, throughout the length and breadth of the land, the reverberations from the guns of bench and bar in honor of the centennial anniversary of the accession to

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the Supreme Court of the United States by its great Chief Justice will be listened to by the lawyers and judges throughout the country. I deem it an especial privilege, even as a substitute, to be permitted to contribute my mite to that universal celebration.

The United States has had, to adorn and honor its great court, great chief justices. It has had its Jay, its Ellsworth, its Taney, its Chase, its Waite, and has its Fuller, but the subject of this paper was not simply *par inter pares*, but *facile princeps*. He was pre-eminently *the* chief justice; worthy to rank worthily alongside of the great justices of England — Eldon, Ellenborough, Mansfield — who shed lustre on and added fame to the jurisprudence of England.

John Marshall was born in Fauquier county, Virginia, September 24, 1755, one of fifteen arrows in the bountiful quiver of Thomas and Mary Marshall.[1]

In 1798 President Adams offered him the seat on the Supreme Bench made vacant by the death of Mr. Justice Iredell, which he, however, declined, and Bushrod Washington was appointed to the place.

Upon the retirement of Mr. Ellsworth he was, January 31, 1801, appointed by President Adams as Chief Justice of the Supreme Court, was unanimously confirmed by the Senate, and took his seat February 4, 1801, where he continued to serve until his death, July 6, 1835, over thirty-four years.

The roll is a long, an honorable, an illustrious one: soldier, patriot, legislator, diplomat, statesman, lawyer, historian, judge. There was but one other step possible

[1] The speaker then proceeded to relate the chief incidents in the career of Marshall prior to his appointment as Chief Justice, which have appeared in preceding addresses, and hence are omitted here.

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for him to take, and, looking back over the many and glorious years in these various positions, it is not at all certain that, if he had taken that last and higher step, it could have added aught to the glory or fame of his career.

As a young man, in the formative period of his career, he was put to the test of battle and learned not only what it was to think and write and talk for his country, but also to fight for her, and this love of country, emphasized and burned in, if not born on the battle-field, always remained a potential factor in his career.

I know of no better school in which to learn the lesson of Divine love for country than in march, in camp and on the field of battle. The flag, rising and falling on the perilous edge of battle, has a new meaning. The stars, shining in the fringe of steel bayonets, and the stripes, rising and falling in the smoke of conflict, give to the soldier a memory that no other experience can afford. And so, while as a soldier he was on a par in achievement and fame with the numberless many that had similar experiences, his mind was by these very experiences fitted and prepared for the great duties that were to come upon him thereafter.

As a lawyer he was trained and skilled in the technical requirements of the profession. To one who is deeply wedded to his profession, it is scant comfort to know how small a place in the world's history the mere lawyer fills. While he is in the active and vigorous prosecution of his profession, he may fondly hope that he is making a name and a place that will live, but when age or infirmity comes he realizes sadly that it is merely "*stat nominis umbra.*" The world passes by him and is, perhaps, neither better nor worse for his having lived. Who, ex-

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cept the few who follow the history of the lawyer to-day, recalls anything of Rufus Choate, in his day one of the foremost lawyers, if not the foremost, at the bar, except the bitter gibes of Boston and its thieves flung at him by Wendell Phillips.

While, when engaged in the active profession, Mr. Marshall stood at the very front of the bar of Richmond, the records of the Supreme Court of the United States show that, although the court was organized in 1789, during the entire period intervening between the organization of the court and his accession to the office of Chief Justice, he appeared before it in but one case (Ware, Adm'r, *v.* Hylton *et al.*, 3 Dallas, 199) and failed in that. This was doubtless accounted for largely by the fact that his services were in constant demand in his own locality, and that he could not spare the time to make the journey in any ordinary case from Richmond to Philadelphia. From 1861 to 1865 it required four long years to make the trip from Washington to Richmond, and it was impossible to make the trip from Richmond to Washington even in that time! The trip from Richmond to Philadelphia was not quite as elaborate or difficult as later was the trip from Washington to Richmond, but it was enough. While, however, his fame as a lawyer has, in the passing years, sunk into comparative insignificance, the prompt, faithful and efficient performance of those duties was a magnificent education for the position which he was later to adorn.

As a historian he cannot be said to have taken a front rank. The great research, the careful investigation which his volumes upon the Life of Washington disclose have been a mine of wealth from which others have dug the materials that they have needed, but the work did not add to

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his fame. Indeed, he himself, in after years, is understood to have admitted as much. The first volume, containing the introduction and giving a *résumé* of the history of the various colonies preceding the Revolutionary war, is a model. How much of the volumes themselves were the actual work of Marshall I do not know. The title page, written by one who knew the use of exact and accurate language, says that it is "compiled under the inspection of the Hon. Bushrod Washington from original papers . . . to which is prefixed an introduction . . . by John Marshall." Whether the compiling was done by Marshall and the work by Washington, or the compilation was by Washington and the work by Marshall, it is difficult to say. The book itself does not bear internal evidence of the clearness and succinctness that appear in his judicial opinions, and how it was possible for a lawyer, between the death of Washington and the publication of the volumes, in the active practice of his profession, and doing so faithfully and well the work in the first few years on the bench, in a position novel to him, deciding questions that covered almost the entire range of human knowledge, to give to this work the time necessary to do justice to himself and his great subject, is difficult of comprehension. One thing, however, is true, and that is that the insight which such labor imposed and conferred, into the great motives and great deeds of him who was "first in war, first in peace, and first in the hearts of his countrymen," give a color and tinge to the banks through which the streams of judicial decisions were thereafter to flow that can hardly be sufficiently appreciated, and broadened and deepened the view of the great brain upon which this Nation, its jurisprudence and its Constitution were built.

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As a member of the State legislature and of the executive council there was brought to his mind, and he was compelled to study and consider, the wants, the aspirations, the objections and necessities of his native State and its relations with the General Government, which, supplemented by his service in the halls of Congress, where he was bound to know the necessities of the Nation and its comparative rights and requirements as against the State, placed him in a position in which he could accurately and clearly define the rights of the one without overlooking the powers of the other.

As a diplomat, while no treaty is written upon the statute books as a tribute to his achievement, his embarrassed attitude in connection with the French government, cooling his heels in antechambers, coming in contact with and sought to be played upon by the master liar of the age, Talleyrand; seeing the excesses, the vices, the weaknesses and tyrannies of French liberty, to a thoughtful, reflective and judicial mind furnished that knowledge that, viewing it from afar, could never have given to him and enriched his mind with a knowledge of the danger that might lie to a republic in the failure to discriminate between liberty and license, or in the worship of liberty gone mad.

As member of the Cabinet, with a personal knowledge of the close and intimate relations between the President and his official family, and hence of the comparative rights, duties and obligations of the executive and legislative departments of the government, the knowledge which had theretofore been abstract became concrete, and the statesman was, by his experience, fitted to become the judge and arbiter between the great departments of the government.

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While, considered in each of these respective positions, Marshall was great and would have left his imprint upon the times, still, had his life ceased on the 31st of January, 1801, it is doubtful whether he would have been regarded as playing an important part in the history of his country All of these were simply preparatory to the great field which was opened before him — the field of construction, definition and application of laws to rights, public and private; it was the great school in and through which he graduated into the higher seat upon the bench. They were the springs, the rivulets, the streams, the rivers, rising in the rocks of war, flowing through the meadows of peace, past the hamlets and cities of legislative experience, over the shoals and sands of controversy, until they emptied into the great ocean from which he drew his inspiration for his work upon the bench. Of all these positions, although they were filled well and honorably, it might truthfully be said, as was said of the French warrior who, after retiring from the profession of arms, devoted himself to the cultivation of and produced a new thing of beauty:

"Who is there now knows aught of his story?
What is left of him but a name?
Of him who shared in Napoleon's glory,
And dreamed that his sword had won him his fame!

Ah! the fate of a man is past discovering,
Little did Jacqueminot suppose,
At Austerlitz or Moscow's burning,
That his fame would rest in the heart of a rose!"

And Marshall's fame rests, and must rest, with a halo that will surround his name through all coming generations, so long as this Nation and this Constitution shall last, upon his decisions as Chief Justice of the Supreme Court of the United States, that fastened upon this peo-

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ple for all time that great instrument, of which Mr. Gladstone said: "As the British Constitution is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most perfect work ever struck off at a given time by the brain and purpose of man."

In a sense, the judicial department is the weakest of the three into which American government is divided. It has neither the purse nor the sword. It has no appointing power, no patronage of office, and yet in a broader and truer sense it can be well said to hold its own with either of the other two.

"I knew a very wise man," said Andrew Fletcher, of Saltoun, "that believed that if a man were permitted to make all the ballads, he need not care who should make the laws of a nation." And, in a sense, it is true that a court of last resort can say: "Give us the power to construe, to define, to overturn the acts of the legislative body of the Nation, and it need not concern us very much what acts they pass." A law of Congress or General Assembly means what the court construing it says it means; neither more nor less. If the court say it is valid, it is valid. If the court say it is void, it isn't worth the waste paper that it is written upon. And in all legislative experience courts are to be reckoned with, for their say is the last.

The Constitution was created by the great convention that met in Philadelphia and sat behind closed doors in 1787–88. The fifty-five men from the twelve States (Rhode Island refusing to participate), and there were giants in those days — Randolph, Washington, Mason, Wythe, Madison, Ellsworth, Sherman, Gerry, Livingston, Hamilton, Dickinson, the Martins, Pinckney, the

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Morrises, Wilson and Franklin — constituted a galaxy of brains, talent, patriotism and creative capacity that has never been surpassed in the history of the world, if it has been equaled. Jay, Hamilton and Madison, in the *Federalist*, construed and supported it. Webster, Wirt, Dexter, Pinkney and Hopkinson argued it in the courts. Calhoun, Webster, Benton, Clay and that wonderful coterie of distinguished statesmen that adorned the halls of Congress when the century was yet young, debated, discussed and legislated concerning it; but, after all, it was John Marshall, more than any man that ever lived, that made it; that is, told what it meant.

The Constitution of the United States, notwithstanding all the claims as to how it marches on, and that this government is institutional rather than constitutional, as it left the pen and decree of John Marshall is substantially the constitution of this, the beginning of the twentieth century. The first ten amendments, in the nature of a bill of rights, were adopted before he assumed the bench, and so nearly after the adoption of the Constitution itself that they can fairly be said to be parts of the original Constitution. The eleventh amendment was proposed as the result of the decision of Chisholm *v.* Georgia, 2 Dallas, 419, and ratified by January, 1798. The twelfth amendment, providing for the election of President and Vice-President, was proposed within three years after his accession to the bench and ratified inside of four years. No amendment was thereafter sought to be made until the conclusion of the war of the rebellion, when the thirteenth, fourteenth, and fifteenth amendments were ratified between December, 1865, and March, 1870. Of these the thirteenth, abolishing slavery, was simply writing in words what had been theretofore written in bayo-

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nets and blood. The fourteenth and fifteenth, with possible exceptions for the protection of corporate capital, are largely obsolete. With the amendments to the State Constitutions of the Carolinas, Mississippi and Louisiana, and the practical abrogation of their principal parts in a great portion of the country, acquiesced in by Congress and the chief executive of the only party that ever believed in their enforcement, they may be well said to have become, in principle and historically, a thing of the past.

In the Slaughter-House Cases in 16 Wallace, Mr. Justice Miller, the Cœur de Leon of the Supreme Court in these later years, speaking of the provisions of the fourteenth amendment, said, at page 81 of 16 Wallace:

"In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. . . . We doubt very much whether any action of a State, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other."

Mr. Justice Matthews, in a carefully considered opinion, speaking for that court, said that it was not to be construed as "a harbor of refuge for distressed or insolvent corporations." While the views of Mr. Justice Miller have not turned out to be entirely true, and resort has

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been made to that great court for relief by others than the colored race under the fourteenth amendment, few and far between have been the cases in which the relief asked for has been granted, and it is practically true that the Constitution of to-day is the Constitution as Marshall left it in 1835.

During the years that intervened between 1801 and 1835, many and great were the cases that came before that great court for consideration. It is not possible, within the limits of a paper that any one would tolerate to listen to, even to call the roll of the great cases in which the Chief Justice rendered the opinion, but any paper upon this subject would be incomplete that did not give in his own exact phraseology his methods of arriving at the conclusion which the court announced.

The feeling between Marshall and that other great Virginian, Thomas Jefferson, was not specially friendly, nor were the relations between the retiring and the incoming President in 1801 any more cordial or pleasant. In the expiring hours of the Federalist domination, Adams had nominated a number of officers for the District of Columbia. Their nomination had been approved and confirmed by the Senate. Marshall, who, although Chief Justice, continued to act as Secretary of State until midnight of the 4th of March, 1801, had an actual personal knowledge of these transactions. He was succeeded by Mr. Lincoln at midnight of March 4, who acted as *ad interim* Secretary of State until Madison was confirmed as the Secretary of State for Jefferson. In the closing hours of Adams's administration, in some manner, these commissions, although signed and the great seal attached, had not been actually delivered, and after the death of the old king and the new king had been wel-

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comed with hosannas of praise, the parties entitled to these commissions found that the Secretary of State would not deliver them, and an application was made in the Supreme Court of the United States, in the case of Marbury *v.* Madison, for a mandate to compel the Secretary of State to deliver the muniments of title, and the questions presented were:

1. Were the petitioners entitled to their commissions; and,

2. Was the act of Congress conferring upon that court, as a part of its original jurisdiction, the power to issue writs of mandate, constitutional.

The facts out of which these questions arose were not new to the Chief Justice. Although he had been nominated, confirmed and commissioned Chief Justice, he continued to act as Secretary of State up to the last moment of Adams's term of office, and must have known of the appointment, commissioning and affixing of the great seal to the commissions of the parties, and that their commissions were withheld by his successor.

A written Constitution was unknown theretofore. It was an unheard-of thing that a court should hold an act of Parliament invalid because in opposition to the British Constitution, and for the first time in the Supreme Court the question was carefully considered as to the power and duty of a court to stand between Congress and the fundamental law of the land. Now that is not a matter of infrequent occurrence. Then it was novel and extraordinary. . . .

In 1810 the case of Fletcher *v.* Peck, 6 Cranch, 87, came before the court. Georgia had made disposition of certain unappropriated lands. Subsequently the legislature, claiming that the original act had been procured by fraud

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and corruption, had repealed the law, and its right so to do under the constitutional provision forbidding a State to impair the obligations of a contract and the power of a court to investigate the motives of legislators was presented. Upon this latter question the Chief Justice said:

"If the principle be conceded that an act of the supreme sovereign power might be declared null by a court in consequence of the means which produced it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

"If the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct, and if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned. . . .

"It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative act which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another, founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law."

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And at page 336: "The validity of this rescinding act, then, might well be doubted were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union; and that nation has a Constitution, the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States, which none can claim a right to pass."

In 1819 the power of the State of Maryland to tax the branch of the Bank of the United States located in that State came up for decision upon writ of error to the Supreme Court of Maryland in the case of M'Culloch *v.* The State of Maryland *et al.*, 4 Wheaton, 316, in which, among other things, the Chief Justice said, at page 400:

"The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed, and an opinion given which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance and of the awful responsibility involved in its decision. But it must be decided peacefully or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty."

In 1824 the question of the power of the States to control navigation was presented in the Supreme Court upon

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a writ of error to the court of New York in Gibbons *v.* Ogden, 9 Wheaton, 1.

[After an extended reference to Marshall's opinion in this case the orator proceeded:]

Did time permit, I would be glad to give extracts from the opinion of the Chief Justice in Sturges *v.* Crowninshield, 4 Wheaton, 122, where the power of the State to pass a bankrupt law was decided, and Osborn *v.* United States Bank, 9 Wheaton, 738, where it was held that the United States court might in an equity suit, by injunction, restrain public officers of a State from destroying a franchise of the bank under a void law of the State, notwithstanding the State was the real party in interest; from Handly's Lessee *v.* Anthony, 5 Wheaton, 374, where the jurisdiction of Virginia and Kentucky over the Ohio river was settled; Weston *v.* Charleston, 2 Peters, 449, where it was held that neither the State nor any political subdivision of it might levy a tax upon the bonds of the United States; Schooner Exchange *v.* McFaddon *et al.*, 7 Cranch, 116, where the question was presented of the right of the courts of this country to interfere with a public armed vessel of a foreign nation upon the claim that the vessel belonged to them and their title had been improperly divested; Brown *et al. v.* Maryland, 12 Wheaton, 419, where the question was presented of the right of a State to levy a tax upon importations while remaining in the original packages; Sexton *v.* Wheaton, 8 Wheaton, 229, where the relations between husband and wife were considered upon the charge that the wife had participated in the fraud upon her husband's creditors; Loughborough *v.* Blake, 5 Wheaton, 317, where it was held that Congress had plenary power to levy taxes within the District of Columbia; Cherokee Nation *v.* Georgia, 5 Peters, 1,

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where the doors of the United States courts were slammed in the face of the Indian; Craig *et al. v.* Missouri, 4 Peters, 410, where it was held that certificates contemplated to be circulated as money, issued by Missouri, were unconstitutional; American Insurance Co. *v.* Canter, 1 Peters, 511, where the court passed upon the power of Congress to legislate in the Territory of Florida, a matter of great interest at the present moment in these days of enlarged boundaries, enlarged responsibilities and embarrassing complications; Bank of the United States *v.* Planters' Bank of Georgia, 9 Wheaton, 904, where the court held that the fact that a State was the owner of stock in a corporation did not deprive the United States courts of jurisdiction, and that when a State accepted the position of a stockholder it abdicated its sovereignty; *In re* The Antelope, 10 Wheaton, 66, where the courts considered and decided the morals and legal and international status of the slave trade; Johnson *v.* McIntosh, 8 Wheaton, 543, where the court held that a title to lands derived solely from a grant made by an Indian tribe could not be recognized by the courts of the United States; Worcester *v.* Georgia, 6 Peters, 515, where the court held that the acts of the State of Georgia, punishing a missionary for preaching to the Indians, with the permission of the President of the United States and the consent of the Cherokee nation, were unconstitutional, and the prisoner was ordered discharged; the great case of Dartmouth College *v.* Woodward, 4 Wheaton, 518, cited, perhaps, more frequently than any other case that has appeared in the law books, where the sacredness of the rights of property devoted to eleemosynary and educational purposes was placed beyond the limits of the legislature of a State; but I am admonished that life is short, although this paper is

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long, and I feel that, while your charity would be great, it is not like that described by Paul, in that, while "it suffers long and is kind, it never faileth," and I must leave those cases, household words to every lawyer, to the curiosity of those who have a desire to investigate them.

John Marshall's brain and pen were as fertile and productive as were the loins of his father. Taking his seat upon the bench in 1801, he immediately assumed the reins and held them with an unfaltering hand until by death they fell from his nerveless grasp. During the six volumes of reports following his accession to the bench, from 1 to 7 Cranch, from 1801 to 1811, with scarcely an exception, and those apparently consisting of cases where he had been of counsel before his appointment, or his relations were such that he ought not to participate in the decision, every opinion was prepared and handed down by him.

Upon the accession of Mr. Justice Story to the Supreme Bench in 1811, a new order seems to have obtained; thenceforth the other justices participated in the preparation and filing of separate opinions, but the great constitutional questions still fell to the Chief Justice. Story, with his wide reading and great learning in the law, not only of his own tongue and land, but of other lands and tongues, enforced and enriched his opinions by copious references to and quotations from the authorities, but the Chief Justice seldom broke the current of his opinion with references to authorities; an occasional reference to Blackstone, an allusion to the principle established in a particular case, an occasional analysis of authorities supposed to be adverse to or in support of the principle that his own great court was announcing, was as far as he seemed to think it was necessary to go.

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Law books were then rare, reports infrequent. In these later days, when the great publishing houses, not to speak of the forty-five States of the Union, are grinding out a fresh grist of new reports every few minutes; when law writers, with abundant law students in their offices to search out authorities with which to pad a new publication on the law of ———; when a goodly portion of a lawyer's time is spent in explaining that he will, perforce, endeavor to get along without the assistance of the invaluable publication that is urged upon him, the average practicing lawyer sighs for some incendiary Mohammedan, who should burn up all the law books — not kill all the lawyers — and give us a fresh and a fair start in the making of jurisprudence. Oh, for the halcyon days of John Marshall, when a legal question might be argued upon principle and decided upon reason, without reference to whether the Supreme Court of Idaho, or of Florida, has given an opinion upon the question!

The literary field of a judge is somewhat circumscribed. Flights of fancy and imagination; soaring in the atmosphere and seeking the sun, not the sunlight; even the delicate exercise and play of humor, except in rare and occasional instances, constitute fields that are forbidden to him in the nature of things. Who would tolerate the spectacle of Judge Dowling[1] reading an opinion from the Supreme Bench at its semi-annual open session, referring to the breaking of the day that

> "Night's candles are burnt out and jocund day
> Stands tiptoe on the misty mountain tops."

Or of Judge Monks,[1] after attending one of the many functions in connection with the dedication of the Co-

[1] Judges of the Supreme Court of Indiana.

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lumbia Club, excusing the quality of his work by saying:

> "No sleep till morn, while youth and pleasure meet
> To chase the glowing hours with flying feet."

Or of Judge Baker[1] opening a dissenting opinion with the expression:

> "Once more unto the breach, dear friends, once more."

When Mr. Justice Harlan, or some other learned justice, shall announce from his high court the constitutional limitations and the powers of Congress over conquered and ceded territory in the Porto Rican cases, should he feel moved to emphasize and illustrate the added power and territory of this United States by speaking of it as a nation "whose morning drumbeat, following the sun and keeping company with the hours, circles the earth with one continuous and unbroken strain of the 'Star Spangled Banner,'" the very foundations of the Capitol would rock and sway under it, and the listeners would marvel at the strange and extraordinary spirit that had come over the Supreme Court of the United States and wonder if it were worth while to extend the territory and increase the power of the government at the expense of shocking all the traditions as to the judiciary and its methods of clothing its ideas with language.

The qualities of thought and language that are required from a judge are those of clearness, lucidity, logical arrangement, force, fairness and honesty, and "whatsoever is more than these cometh of evil." While this is true, and while it is also true that Marshall never violated the traditions or went counter to the recognized literary limits as applied to the courts, his language was so chaste, so clear, so appropriate, so convincing, that his opinions

[1] Judge of the Supreme Court of Indiana.

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have all the charms of a novel and his diction the beauty of a poem. They were made for a purpose, and that purpose was fully and completely carried out to every iota. Whether his views should have obtained, or those of the two Jeffersons, Thomas or Davis, ought to have obtained (and it is not within the purview of this paper to enter into a discussion of that difference), he gave his views with a wealth of diction, a clearness and precision of statement, a dignity and character of patriotism that embedded them forever in the history of jurisprudence and made the Constitution of the United States John Marshall's Constitution. And generations yet unborn will bless his name and thank God for his work.

A dinner was given by the State Bar Association at the Columbia Club in the evening, at which Edwin P. Hammond presided, where responses were made to appropriate sentiments by William A. Ketcham, U. Z. Wiley, Newton W. Gilbert, D. W. Simms, Daniel E. Storms and Robert S. Taylor.[1]

[1] The proceedings of the State Bar Association of Indiana at its meeting on Marshall Day, including the addresses, and the sentiments and responses at the dinner, appear at length in the Official Report of the fifth annual meeting of the Association, 1901.

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STATE OF ILLINOIS.[1]

Marshall Day was impressively observed in the State of Illinois. In the Appellate Court of Illinois on January 31, 1901 (this being the last day of the court's session prior to Marshall Day), Stephen S. Gregory, of the Chicago bar, in the presence of a large audience and at the request of the Associated Committees of Illinois, moved the court, in fitting terms, to adjourn its session over Marshall Day, which the court did, the response being made by Mr. Presiding Justice Francis Adams.

Similar proceedings were had in the Branch Appellate Court of Illinois, First District, on February 1, 1901, the motion being made by Robert Mather of Chicago and the response being made by Mr. Presiding Justice Shepard. A similar motion was also made in the United States Circuit Court of Appeals by John N. Jewett, of the Chicago bar, the response being given by Circuit Judge Woods. A similar motion was made in the United States Circuit and District Courts for the Northern District of Illinois by Charles K. Offield, the response being made on behalf of the court by Judges Seaman and Kohlsaat.

A similar motion was made by Merritt Starr in the Superior Court of Cook County on February 2, 1901, the response being given on behalf of the court by Judge

[1] The proceedings in Illinois were published by the Associated Committees of that State in a quarto volume of one hundred and ninety-four pages, in which the proceedings in the several courts and at the banquet, together with the addresses and responses, are given in full, including the proceedings before the Supreme Court of Illinois.

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Gary. A like motion was made in the Circuit Court of Cook County by Simeon P. Shope, the response on behalf of the court being made by Chief Justice Smith. A similar motion was made by William S. Forrest in the Criminal Courts of Cook County, the response on behalf of the court being made by Judge Tuley. A similar motion was made in the County Court of Cook County by James B. Bradwell, the response on behalf of the court being given by Judge Carter. A like motion was made by Mary M. Bartelme in the Probate Court of Cook County, the response being made by Judge Cutting.

Celebration at Chicago.

The principal celebration in Chicago was held at the Auditorium Theatre.

The proceedings were opened by Adolph Moses, Chairman of the Associated Committees of Illinois, in the presence of an audience of over three thousand persons. After appropriate music and an invocation by Bishop Samuel Fallows, Mr. Moses spoke as follows:

Address of Adolph Moses.

In my capacity as chairman of the Associated Committees of Illinois, representing the Illinois State Bar Association, the Chicago Bar Association and other bodies of the bar, I declare the centennial exercises of John Marshall Day officially opened. One hundred years ago, on the 4th of February, 1801, at the close of the administration of President John Adams in the city of Washington, John Marshall of Virginia took the oath of office as fourth Chief Justice of the United States, as shown by copy of the official record, printed on the program of the

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day. The centennial of John Marshall's assumption of this high office is now undergoing its celebration in all parts of our common country.

On July 7, 1899, before the assembled State Bar Association of Illinois, sitting at Chicago, the following statement was foreshadowed: "The celebration of this day by the bench and bar of the United States will bring together the greatest assemblage of lawyers and judges which the world has ever witnessed, and the dedication of the day will mark an event unexampled in the history of English-speaking lawyers and judges." I am gratified to be able to state to this magnificent audience, and to the larger audience of the nation, that this prophecy has been reasonably fulfilled. On this historic and most unique day the uncommon fact must be recorded that judicial business has been practically suspended in all the courts of the Nation and of the States and Territories, including the District of Columbia. As the result of an unofficial and purely voluntary movement of the American Bench and Bar, aided by the universities, law schools, public schools and a large number of people, the exalted position of Chief Justice of the United States has been brought prominently before the eyes of the people in the personality of that great constitutional seer, John Marshall. Let it also be recorded at this time that the solidarity of the American bench and bar has for the first time been accomplished in this great purpose, and the cause of education and enlightened patriotism has been greatly aided.

This was and is the sole object of John Marshall Day, which at the beginning of the twentieth century emphasizes the resolve of the American people that popular government shall find its greatest triumph in the principles of enlightenment and justice. American law

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and order, constitutionally expressed, must remain triumphant in the twentieth century; it will so remain when safely anchored in the great constitutional announcements of Marshall, which gave strength to the nation without detracting in the least from the powers of the States when exercised in their proper sphere. Let us on this day be rededicated to constitutional liberty of the true American mold and the educational purpose of John Marshall Day will have been grandly accomplished.

I have the great pleasure to introduce to the audience as its chairman the honorable President of the Chicago Bar Association, John S. Miller, who will now take charge of the meeting, which will enjoy the distinguished honor of listening to a centennial oration by one of the Senators of the United States, representing the ancient and enlightened Commonwealth of Massachusetts, whose son, President John Adams, gave to the American people its greatest Chief Justice, John Marshall of Virginia. It is an inspiring theme and will receive ample treatment at the hands of our chosen orator, for whose presence on this platform the Associated Committees tender to him their profoundest thanks.

Letters were read from various descendants of Chief Justice Marshall, after which John S. Miller, President of the Chicago Bar Association, introduced the orator of the day, Henry Cabot Lodge of Massachusetts.

Address of Henry Cabot Lodge.

One hundred years ago to-day John Marshall was duly sworn in and took his place upon the bench of the Supreme Court as Chief Justice of the United States. There seems to have been no ceremony, no parade, no pomp of any kind about the doing of it. The record of the Su-

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preme Court tells us in dry, official words that on February 4, 1801, the great Virginian lawyer assumed the highest judicial office in the country. That is all. The fact itself dropped so quickly into the babbling current of daily events that the parting of the waters was quite unheard. Yet the circles which this noiseless deed then made in the stream of Time have gone on widening with growing force until to-day all over this broad land, everywhere among this mighty nation of nearly eighty millions, the members of a great profession, the teachers and students of universities, the President, the Congress and the courts, have gathered to commemorate fittingly the official action so quietly performed a century ago. Here, then, it is very plain was a great man, one worthy of much thought and consideration. Is there, indeed, any subject better worth thought and consideration than a real man, so great that he not only affected his own time profoundly, but has projected his influence through the century, and holds still in a firm grasp the mind and the imagination of posterity? I am sure that by thoughtful men this question can be answered only in the affirmative.

As I have reflected upon that event, so briefly mentioned in the routine of the Supreme Court record for the year 1801, there is one thought which has prevailed in my mind above all others. When Marshall took the oath as Chief Justice he was Secretary of State, and for a month he continued to hold both offices, and to wield very vigorously the powers of the State Department. Perhaps this may not strike other minds as of much importance. To me it seems full of significance. The fact that holding two such offices at the same time is repugnant to our present ideas of propriety is in itself worth a moment's consideration, although it does not contain the deeper

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meaning which is to be found in this incident. It is quite true that to-day no President would think of permitting the Chief Justice to be a member of his cabinet for an hour, and no Chief Justice would allow himself to occupy such a position for an instant. Should such a thing occur, the storm of adverse criticism which would beat upon both the President and Chief Justice can be readily imagined. The spectacle of a Chief Justice acting as the chief of a party cabinet and in the spirit of party politics would now horrify every one. Then it horrified nobody. In 1801 we were still very near to England in manners and in habits of thought. We had as yet no administrative traditions of our own. Pluralists were not uncommon in English ministries; great judicial officers had often served as ministers of the crown; to this day the highest judicial officer in Great Britain is a member of the cabinet, his place is purely political in tenure, and he rises and falls with his party. The English practice of having the chief law officer a member of the government we have wisely retained in our Attorney-General, but with equal wisdom we have discarded entirely their custom of having judicial officers in high political place. A United States judge to-day can hold no other office, and when he ascends to the bench the door of political preferment closes behind him. All this practice is deeply fixed and rooted now, but it was not so in 1801.

This is not said with any view of defending Marshall. John Adams and the Chief Justice, who remained in his cabinet helping him to fill with tried Federalists every vacant or newly created office, were not only high-minded and honorable men, but absolutely void of offense in this particular. The system under which they acted is not so good as the one we have since developed,

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that is all. To accuse them of wrongdoing would be as absurd as the educated ignorance which, parrot-like, repeats the conventional cant of its own circle about the decline in the character and standard of our public life at Washington. If, for example, we are to believe the Maclay Diary, the first Senate of the United States was corrupt and decadent to the last degree; the fruit of the Constitution was rotten before it was ripe. But posterity knows that the first Senate was upright and honorable, composed of able men doing their best, and their best, although very good, was doubtless imperfect, to solve in hard conflict the difficult problems of their day. If Maclay was right in picturing the first Senate as bad, and the professional fault-finder of the moment is also right in his proposition, that all public men have declined in character, then we are met with the startling contradiction that our government still exists. The trouble is that the contemporary who can only censure is as untrustworthy as Bache in his opinion of Washington, or as Greeley and many others were in their estimate of Lincoln. The superior person who leads a life of inaction and criticism judges the present by prejudice, and contrasts it with a past that never existed. From the past, of which he is ignorant, he eliminates all that is bad, and from the present, which he does not understand, he excludes all that is good. It is not to be wondered at that a dark cloud of pessimism broods over his mental landscape, or that he is himself a singularly useless person. In the easy blame which such a critic, arguing in his usual fashion, could throw upon John Marshall for holding political office after he became Chief Justice, there has seemed to me an interesting lesson, so interesting that it has led me into this long digression.

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The real meaning of this holding two offices is far different. For a month Marshall was head of the cabinet and head of the judiciary. He was at once statesman and judge, and although he laid down the statesman's place on the 4th of March, 1801, he retained the character to the end of his life, and never ceased to be a statesman while he built up that great reputation which in its breadth and variety surpasses, as I believe, that of any judge or jurist in the splendid legal annals of the English-speaking people.

Many men, far abler and more fit for the task than I, will to-day depict eloquently to the American people the work and the genius of Marshall as lawyer and judge. Upon that inviting field I shall not enter. I shall confine myself to the simpler and humbler task of trying to show how great Marshall was, and how potent his influence has been as a statesman, a side of his character which, unless my reading has much misled me, has been hitherto neglected, if not overlooked, by eyes dazzled with the brilliancy of his achievements and fame as a lawyer.

But to understand what he was we must, as usual, start with an inquiry. How had he been trained, and what were the qualities which enabled him to play in our history these two great parts as jurist and statesman? He was born one of that small body of people who composed the landowning, slaveholding aristocracy of Virginia at the close of the eighteenth century, and which at that time produced, perhaps, a larger amount of ability in the fields of war, law and statecraft than any body of equal numbers in modern times and within a similar period. He came of good stock. His mother was a Miss Keith, whose father was cousin-german to the last Earl

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Marischal of Scotland, and to Frederick's great Field Marshal. His father, whose people appear to have come originally from Wales, was a remarkable man. Planter and pioneer, surveyor and frontiersman, he was a soldier in the old French war and commanded a Virginia regiment in the war of the Revolution, in which three of his sons also took part. A man of action and of the open air, he nevertheless, despite a narrow fortune, had in his remote home in Fauquier county a good library, and, what was still better, a love for books and literature. He had fifteen children and educated them himself, until he brought to his home a Scotch clergyman named Thompson, the pastor of the village. In this way the oldest son John studied, developing a great love for books and for poetry, while he grew hardy and strong in the outdoor life and with the rough field sports of a new country. This lasted until he was fourteen. Then he went to Westmoreland county, studied with the Reverend Mr. Campbell, came home to study again with Mr. Thompson, went as far as Horace and Livy in his classics, then began to mingle Coke and Blackstone with his literature, and finally, following his natural bent, turned entirely to the law. So engaged, the Revolution found him. More and more as the noise of impending strife grew louder he turned from his books to drill his company of militiamen. The storm broke, and Lieutenant Marshall, with his company of riflemen in hunting shirts, was at the first fight, when Lord Dunmore was defeated and driven back to Norfolk. He joined the Continental Army with his company, was at Brandywine and Germantown, wintered at Valley Forge, rose to be a Captain, was brave, popular and deemed to be so fair minded that he was a usual arbiter in all disputes. The next

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summer he was at Monmouth when Washington drove the British finally back into New York; later he shared in the assault on Stony Point and in the brilliant enterprise of Paulus Hook.

The enlistment term of the men in Marshall's part of the Virginian line soon after expired, and he went home to stay until the State raised fresh troops. While he waited he attended the lectures on law of Chancellor Wythe, and got a license to practice. Then, weary of inaction, he set out alone and on foot to rejoin the army as a volunteer. Back he came again when his native State was invaded by Leslie in 1780, and fought under Greene and Steuben. He was out again to fight Arnold, and when the seller of West Point had been repulsed, Marshall, still without men to command, resigned his commission in 1781. The war, however, was then practically over, and he had fought all through it.

Now he went to the bar and began to practice in earnest. He met with immediate success and rose with astonishing rapidity. Before he was thirty he was an acknowledged leader at a bar of remarkable ability. With professional work was also mingled much service in the General Assembly, to which he was frequently elected, often greatly against his own wishes. But presently came the convention to consider the Constitution just framed at Philadelphia, and to this Marshall desired and decided to go. Virginia was not friendly to the new scheme; his own county was strongly against it. He was told that if he would promise to oppose the Constitution his return would not be contested. He replied that he wished to go in order to support ratification, ran, and was elected after a sharp contest in a hostile electorate by sheer force of his personal strength and popularity.

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In the convention he played a great part. He measured swords successfully with Patrick Henry, and if he had not the glowing eloquence of the elder man there was none stronger than he in reasoning, more unanswerable, more convincing. He was one of the determined leaders who finally wrung an unwilling majority of ten votes from an unfriendly convention in favor of the Constitution.

Back he went to his courts and his cases. He had gone to the convention, not for political preferment, but to get the Constitution ratified, and the victory was all he wanted. Still he could not escape service in the Assembly, and as Washington's administration developed its policies, and Virginia, under the delicate manipulation of Jefferson, turned more and more against her great President, Marshall fought the battles of his old chief in the legislature, and on one occasion, at least, carried a vote of confidence in the National Government. Thus without thought and in his own despite he became conspicuous beyond the borders of Virginia. Public men in other States began to look with interest and admiration at the lawyer already distinguished at the bar who with perfect courage and great intellectual power was fighting the battle of Washington in an anti-Federalist community; a man who did not fear to defend in Virginia the Jay treaty in the darkest hour of its unpopularity. Marshall himself in one of his rare letters speaks of the warm manner in which the leading New England Federalists received him in Philadelphia, filled with wonder that a man so sound in opinion should exist in Virginia.

With a political reputation growing and expanding so fast, it was only a question of time when he would be called to do national work. Washington desired that he

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should accept the mission to France, but he declined. Later the same offer came from President Adams, and this time the circumstances were such that Marshall felt it to be his duty to accept. Our relations with France had gone from bad to worse. The French government had treated us as if we were little else than a vassal state. They had seized our ships and spared us no insult. The spirit of the country was rising, and the dominant Federalists, if not eager, were certainly not averse to a war with the revolutionary government at Paris, with which their political opponents sympathized and which seemed to them representative of those forces of anarchy and disorder which it was their own special mission on earth to combat. Mr. Adams, however, feeling profoundly, as Washington had felt in the case of England, the peril of war to our new government, was determined to exhaust every effort to preserve peace with our former ally, although the France of the revolution was as distasteful to him as to any of the Federalist leaders. With this purpose in view he joined John Marshall and Elbridge Gerry with Charles Cotesworth Pinckney, who had been refused recognition as Minister, in a special mission of peace to settle the differences between the two countries. This was the duty which Marshall felt he could not refuse, and he accordingly sailed from Philadelphia for Amsterdam on the 17th of July, 1797.

Into the history of that famous mission it is not necessary to enter. The course of the Directory and of Talleyrand was in all ways characteristic of one of the most corrupt governments of modern times. Our envoys were flouted, refused recognition or reception, and were informed by base but accurate agents that their only way to obtain their object was to bribe, first, Talleyrand, then

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the Directory, and then France herself. The American envoys, like honest men, rejected all these advances absolutely and with ill-concealed disgust. The American case, stated in an argument of consummate ability, drawn by John Marshall, was also laid before Talleyrand. But that eminent person was not interested in arguments. What he wanted was money. Pinckney and Marshall saw this clearly enough, and, securing their passports, not without incurring plenty of fresh insults, took their departure. Gerry, deluded and hoodwinked by Talleyrand, remained, and when a new commission was sent peace was made, not because Gerry stayed or because John Adams broke with his party in renewing his efforts for peaceful settlement, but because hostilities had begun, and Truxton's guns and shattered French frigates had taught France that if we would not bribe we could at least fight. When Marshall returned to the United States he found events had moved rapidly toward the fighting stage. The letters inviting our envoys to bribery and corruption as well as to humiliation had been published, and the country was filled with righteous wrath. Marshall was received with acclaim as loud as it was deserved, and it was at a banquet in his honor that the words attributed to Pinckney were given as a toast: "Millions for defense, but not one cent for tribute." This was the sentiment of the country, and it portended a severe reaction against the party of France so ably led by Jefferson.

Into that party struggle Marshall had no intention of entering. He had performed well and fearlessly a duty which he had not sought, and his one wish now was to go back to his office and his clients and to the profession which he loved. But it was not to be. President Adams offered him a seat on the Supreme Court bench, which he

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declined, but refusal was not so easy when he was summoned to Mount Vernon and urged to stand for Congress. The course of Jefferson and the anti-Federalists with their French sympathies had alarmed Washington profoundly. He felt that in order to sustain the government the Federalist party must be supported. He had led that party in his last years of office, and he was so impressed by the political perils of the time and by the growing power of foreign influence that he could not remain inactive now. So Marshall listened to the voice which seldom spoke in vain to any American a century ago, and much against his will became a candidate for Congress. His honest and manly stand in Paris and the honor and applause he had gained at home, however, could not save him from the attacks of Jefferson and his followers. They opposed him strenuously, crying out against him as a monarchist, which was the Jeffersonian language for any man who liked a strong central government or who believed that the United States was a nation and not an alliance of petty republics. The contest was heated and the majority small, but Marshall won, and aided by his personal popularity carried the Richmond district, a very considerable feat.

The Congress to which he was chosen was a memorable one. The Federalist party, by sheer force of ability, not only in the Executive but in both branches of Congress, had established the new government, organized its machinery and founded its policies. It was a vitally necessary work, but the men who had wrought it had not only incurred the usual hostility which always meets those who are doers of deeds, but they also had the additional unpopularity which was due to their superior abilities and their uncompromising and often overbearing

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methods. They had carried their measures with difficulty, for they were usually in a minority in Congress, and this condition had been a useful check upon them. Now, however, the attempt of France to bribe our envoys had produced a just revulsion of feeling against the party of Jefferson, which had made extravagant admiration of France a test of American patriotism, and in the true colonial spirit had forced our politics to turn upon the affairs of Europe. The Federalists carried the election triumphantly and found themselves with a majority such as they had never known. Successful and effective under difficult and adverse conditions, power turned their heads, and their overbearing and arrogant tendencies asserted themselves. Their victory became the precursor of their ruin.

John Marshall, living in a hostile atmosphere, a Federalist in Virginia, was a party man of the hard fibre which is found under such circumstances, but he also had learned in the same school to gauge public opinion and the possibilities of action far better than the men of the North, accustomed to Federalist supremacy. Extreme men from New England thought him over-moderate, if not wavering, because he voted against those natural but most injudicious measures, the Alien and Sedition Acts. In doing so Marshall was neither timid nor wavering, but simply wise, as the events of the next four years were to show. And if his critics could have looked afar into the future they would have seen the Virginian Federalist, whose beliefs were founded upon a rock, alone and in the midst of enemies upholding and extending the principles they loved, when many of their own party had deserted or fallen by the wayside, after their party organization had disappeared, and even when their great party name had

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passed out of existence and was heard only as a by-word and a reproach.

But whether thought too moderate in his views or not, John Marshall went to the front as a leader of his party and as a leader of the House. He shrank from no conflict, and upheld the fundamental principles of his party in a manner of which few men were capable. The conspicuous triumph of his Congressional career, and time forbids the mention of any other, was his argument in the Jonathan Robbins case. Thomas Nash, alias Jonathan Robbins, taking part in a mutiny, had committed a murder on a British frigate, escaped, been captured in this country, and then resisted extradition on the ground that he was an American who had been impressed. President Adams directed that he should be given up if his identity were proved as well as grounds sufficient for commitment had the crime been committed in the United States. The court thought both facts were proved, and the man, who later confessed that he was not an American, was given up by the President's order under a clause of the Jay treaty. It is quite needless to explain that an administration which undertakes to respect and fulfil treaty obligations to England is always an inviting object of attack to the thinkers of the opposing party and presents a tempting field for the investment of political capital. Mr. Livingston, of New York, introduced a resolution censuring the President for his action, more especially for his interference with the judiciary, and Marshall spoke for the defense. Into that luminous and convincing argument I cannot enter. Albert Gallatin sat near the speaker taking notes for a reply. The pencil moved more and more slowly, the notes became fewer and fewer, and at last stopped. "Do you not mean to reply to him?" said a friend. "I do

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not," said Gallatin; "because I cannot." Many of the opposition thought the same, and the resolution was defeated by a vote of nearly two to one.

Marshall's career in the House, however, was as short as it was brilliant. The break had finally come between Mr. Adams and the Hamiltonian Federalists in his cabinet whom he had inherited from Washington. Wherever the right lay it was a lamentable business, and a potent cause of the Federalist defeat. The remoter consequences of this famous quarrel do not concern us here, but the immediate result was the retirement of McHenry from the War Department, which was at once offered to Marshall and declined. Hard upon McHenry's withdrawal came that of Pickering from the Department of State, and this great post Marshall accepted, resigning his seat in Congress in order to do so. It was a difficult and thankless task to assume these duties just at the close of an administration, with defeat impending and the party divided into bitterly hostile factions. Yet such was Marshall's tact and such the respect for his character that he commanded the confidence of the whole party. He completely satisfied Mr. Adams and yet retained the intimate friendship of Hamilton. He was entirely true to the President's policy and yet held the admiring regard of Wolcott, and even of Pickering, whom he supplanted. In the foreign relations with which he was charged the time was too short for the full development of his influence, but we can see in his dispatches the strong American spirit and the quiet but unflinching way in which he gave other nations to understand that we must go along our own paths, and that our dealings with one nation were no rightful concern of any other.

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The last troubled months of the Adams administration, however, soon came to an end. On the 4th of March, 1801, a month after he had been sworn in as Chief Justice, Marshall retired from the State Department. Let us look at him a moment as he stands at the threshold of his great career. He is forty-five years old and in the full maturity of his powers. He is very tall, very spare, rather loose-jointed and careless in his movements. A little ungainly, perhaps, one observer thinks, with the air of the mountains and of the early outdoor life still about him. Evidently muscular and strong; temperate, too, with all the vigor of health and constitution which any work or responsibility may demand. He is not handsome of face with his angular features and thick, unruly hair growing low on his forehead over rather small but very piercing black eyes. None the less, the face is full of intelligence and force, and all observers, however much they differ in details, alike agree that the bright eyes are full of fun, and that about the firm set mouth there plays a smile which tells of that generous and hearty sense of humor which pierces sham and, as Story says, is too honest for intrigue.

No one can say to-day whether Marshall realized as he left the State Department that the great work of his life lay all before him. We know it now, know that all his past career had been only preparatory for that which was to come. And what a training it had been! First of all, he was a lawyer, made so by the strong bent of his mind, in the full tide of successful practice, and holding his well-won place in the front rank of the American bar. He had been a soldier of long and hard service, and had faced death in battle many times. A wide parliamentary experience had been his, drawn from many terms in the

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Virginia Legislature, the Constitutional Convention and a session of Congress. He had been in Europe, had seen European politics at close range, and had measured swords with the ablest, most unscrupulous and most corrupt statesman and diplomatist of the Old World. He had served as a Cabinet Minister, and there had studied the relations of his country to the movements of world politics. He has been a man of affairs great and small, and had lived and fought in the world of men. This varied education, these diverse experiences, may seem to have been superfluous for one who was to fill a purely judicial office, and yet they were never more valuable to any man than to him who was to be the Chief Justice of the United States at that precise period. When Marshall laid down the statesman's office and took up that of the lawyer his work as a statesman was still to do. How great that work was I shall try to show.

When Marshall took his seat on the Supreme Bench he brought with him not only his legal genius and training and his wide and various experience in politics and diplomacy, but also certain fixed convictions. He was a man who formed opinions slowly and who did not indulge himself in a large collection of cardinal principles. But the opinions which he formed and the principles which he adopted after much hard and silent thought were immovable and by them he steered, for they were as constant as the stars. He had one of those rare minds which never confounded the passing with the eternal, or mixed the accidental and trivial with the things vital and necessary. Hence the compatibility between his absolute fixity of purpose in certain well-ascertained directions and his wise moderation and large tolerance as to all else. To these qualities was joined another even rarer, the power

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of knowing what the essential principle was. In every controversy and in every argument he went unerringly to the heart of the question, for he had that mental quality which Dr. Holmes compared to the instinct of the tiger for the jugular vein. As he plucked out the heart of a law case or a debate in Congress, so he seized on the question which overrode all others in the politics of the United States and upon which all else turned.

This vital question was whether the United States should be a nation or a confederacy of jarring and petty republics, destined to strife, disintegration and decay. In a well-known letter to a friend, Marshall says that he entered the Revolution filled with "wild and enthusiastic notions." Most young men of that period, imbued with such ideas, remained under their control, and in the course of events became eager sympathizers with the unbridled fanaticisms of the French Revolution, or at least ardent opponents of anything like a strong and well-ordered government, and equally zealous supporters of State Rights and Separatist doctrines. Not so John Marshall. With characteristic modesty he ascribes the fact that he did not continue under the dominion of his "wild and enthusiastic notions" to accident and circumstances when it really was due to his own clear and powerful intellect. In the struggle with England he came to see that the only hope of victory lay in devotion to a common cause, in being soldiers of the Union and not of separate colonies, and that the peril was in the weakness of the General Government. It seems simple enough to say this now, but the central idea was as a rule grasped feebly and imperfectly, if at all, by the young men of that period. Like Hamilton, Marshall worked it out for himself; and in that same letter he says that it was during the war that he

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came to regard America as his country and Congress as his government. From that time he was an American first and a Virginian second, and from the convictions thus formed in camp and on the march he never swerved. Here was the ruling principle of his public life, and to the establishment of that principle his whole career and all his great powers were devoted. This made him a Federalist. It was this very devotion to a fundamental principle which was the source of that temperate wisdom which made him avoid the Alien and Sedition Acts, because by their violence they endangered the success of the party which had in charge something too precious to be risked by indulging even the just passion of the moment. But the moderation in what he regarded as non-essential was accompanied by an absolutely unyielding attitude when the vital question was touched. Despite the criticisms of the extreme Federalists upon his liberality, there was no more rigid believer in the principles which had brought that party into existence than the man who became Chief Justice one hundred years ago.

Holding these beliefs, what was there for him to do, what could he do, in a position wholly judicial and with every other branch of the government in the hands of his political foes. He was confined to a strictly limited province. To his political opponents the entire field of political action was open. At the head of these opponents was Thomas Jefferson, who hated him intensely. It could not well be otherwise. Not only were these two Virginians politically opposed, but they were antagonistic in nature and temperament. "There are some men," said Rufus Choate, "whom we hate for cause, and others whom we hate peremptorily." Both descriptions apply to the feeling which Jefferson cherished toward Marshall. They

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were as wide apart as the poles. Jefferson wrote brave, blustering words about the desirability of "watering the tree of liberty once in twenty years with the blood of tyrants," and was himself the most peaceful of men, one who shrank from war and recoiled from bloodshed, and who was a rather grotesque figure as a war governor in hurried flight when the British invaded Virginia. Marshall had served in the army for five years. The hunger and cold of Valley Forge, the trials of the march, the dangers of retreat, the perils of many battles, the grim hazards of the night assault, were all familiar to him, and he never talked at all about watering anything with blood or about bloodshed of any sort. Jefferson was timid in action; subtle, acute and brilliant in intellect, given to creeping methods. To him, therefore, Marshall, the man of powerful mind, who was as simple and direct as he was absolutely fearless, and who marched straight to his object with his head up and his eyes on his foe, was particularly obnoxious. Marshall, moreover, had crossed Jefferson in many ways. He had led opposition to him in Virginia, and had wrested from him a Congressional district. Now Marshall was placed in a great position, beyond the reach of assault, and yet where he could observe, and perhaps thwart, Jefferson's most cherished schemes. Marshall in his own way entirely reciprocated Jefferson's feelings. He distrusted him and despised his methods, his foreign prejudices, and, what seemed to Marshall, his devious ways. So strong was this hostility that it almost led him to make what would have been the one political mistake of his life, by supporting Burr for the Presidency when the election of 1800 was thrown into the House of Representatives. From this he was saved by his own wisdom and good sense, which were

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convinced by Hamilton's reasoning that Jefferson, whom Marshall knew, was a less evil than Burr, whom he did not know, but who was known only too well to Hamilton."[1]

[1] He wrote to Hamilton in 1801 of Jefferson, that "by weakening the office of President he will increase his personal power. He will diminish his responsibility, sap the fundamental principles of the government, and become the leader of that party which is about to constitute the majority in the legislature. The morals of the author of the letter to Mazzei cannot be pure."

Van Santvoord says in his "Lives of the Chief Justices," p. 342, on the authority of an eye-witness, that after Burr's trial there was a final cessation of all personal intercourse between Jefferson and Marshall, and that two or three of the Justices of the Supreme Court followed the example of their chief.

Age did not change or soften Marshall's opinion of Jefferson. In 1821 (July 13) he wrote to Judge Story (Proceedings Massachusetts Historical Society for October and November, 1900, p. 328):

"What you say of Mr. Jefferson's letter rather grieves than surprises me.* It grieves me because his influence is still so great that many, very many, will adopt his opinions, however unsound they may be, and however contradictory to their own reason. I cannot describe the surprise and mortification I have felt at hearing that Mr. Madison has embraced them with respect to the judicial department.

"For Mr. Jefferson's opinion, as respects this department, it is not difficult to assign the cause. He is among the most ambitious, and, I suspect, among the most unforgiving of men. His great power is over the mass of the people, and this power is chiefly acquired by professions of democracy. Every check on the wild impulse of the moment is a check on his own power, and he is unfriendly to the source from which it flows. He looks, of course, with ill will at an independent judiciary.

"That in a free country with a written Constitution any intelli-

* The letter here commented on was probably the letter to William C. Jarvis, printed in Washington's edition of the writings of Thomas Jefferson, vol. 7, pp. 177–179, in which Jefferson denies the right of the judges to issue a mandamus to any "executive or legislative officer to enforce the fulfillment of their official duties," and asserts that it is a "very dangerous doctrine" "to consider the judges as the ultimate arbiters of all constitutional questions."

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Jefferson and his party came into power with a great predominance destined to grow more complete as the years went by. They were in principle hostile to the government they were chosen to conduct. They were

gent man should wish a dependent judiciary, or should think that the Constitution is not a law for the court as well as the legislature, would astonish me, if I had not learnt from observation that with many men the judgment is completely controlled by the passions. The case of the mandamus may be the cloak, but the Batture* is recollected with still more resentment."

Again he wrote on September 18, 1821:

"A deep design to convert our government into a mere league of States has taken strong hold of a powerful and violent party in Virginia. The attack upon the judiciary is in fact an attack upon the Union. The judicial department is well understood to be that through which the government may be attacked most successfully, because it is without patronage, and of course without power. And it is equally well understood that every subtraction from its jurisdiction is a vital wound to the government itself. The attack upon it therefore is a masked battery aimed at the government itself. The whole attack, if not originating with Mr. Jefferson, is obviously approved and guided by him. It is therefore formidable in other States as well as in this, and it behooves the friends of the Union to be more on the alert than they have been. An effort will certainly be made to repeal the twenty-fifth section of the judicial act."

In December, 1832, he wrote to Judge Story about the nullification resolutions of South Carolina, then under discussion in Virginia. The following passage is of great interest as showing his profound comprehension of the movement coupled with his accurate prediction of the fate of West Virginia, which came to pass thirty years later, and his undying feeling against Jefferson as the originator of these evils:

"On Thursday these resolutions are to be taken up, and the debate will, I doubt not, be ardent and tempestuous enough. I pretend not to anticipate the result. Should it countenance the obvious design

* The first of these references is to the opinion of the Chief Justice in the case of Marbury v. Madison, 1 Cranch, 153. The second reference is to the protracted litigation which involved the title to what was known as the Batture, near New Orleans, and in which Mr. Jefferson took a strong personal interest.

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flushed with victory. They meant to sweep away all the Federalists had done; they intended to interpret the Constitution until naught was left, and put the National Government and the national life into a straight jacket. In the process of time they found themselves helpless in the grip of circumstances and governing by the system of Washington and Hamilton, whose methods and organization were too strong for them to overthrow. But at the start this was not apparent. The Separatist principle seemed to be supreme, and Jefferson's followers threw themselves upon the work of the Federalists, and in their rage even undertook to break down the judiciary by the process of impeachment, a scheme which failed miser-

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of South Carolina to form a Southern Confederacy, it may conduce to a southern league — never to a Southern government. Our theories are incompatible with a government for more than a single State. We can form no union which shall be closer than an alliance between sovereigns. In this event there is some reason to apprehend internal convulsion. The northern and western section of our State, should a union be maintained north of the Potomac, will not readily connect itself with the South. At least, such is the present belief of their most intelligent men. Any effort on their part to separate from Southern Virginia and unite with a Northern Confederacy may probably be punished as treason. 'We have fallen on evil times.'"

"I thank you for Mr. Webster's speech. Entertaining the opinion he has expressed respecting the general course of the administration, his patriotism is entitled to the more credit for the determination he expressed at Faneuil Hall to support it in the great effort it promises to make for the preservation of the Union. No member of the then opposition avowed a similar determination during the Western Insurrection, which would have been equally fatal had it not been quelled by the well-timed vigor of General Washington. We are now gathering the bitter fruits of the tree even before that time planted by Mr. Jefferson, and so industriously and perseveringly cultivated by Virginia."

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ably, but which no doubt cherished the hope of reaching at last to the chief of all the judges.

In their pleasant plans and anticipations of revenge it must have seemed as if nothing could stop the onset of an all-powerful President backed by a subservient Congress. Surely the national principle, the national life, the broad construction of the Constitution, would shrivel away before such an attack. There seemed no one in the way, for however much Jefferson, ever watchful, may have suspected, his own followers certainly did not reckon as very formidable the great lawyer sitting far apart in the cold seclusion of a court room. Yet there the enemy was. There he sat intrenched. His powers were limited, but his opponents were to find out what he could do with them. They were to learn by bitter experiences that even these limited powers in the hands of a great man were sufficient to extend the Constitution and to build it up faster and far more surely than they by Executive act or Congressional speeches could narrow it or pull it down. Those of them who survived were destined to behold the ark of the national life, carried through the dark years of the first decade of the century, emerge in safety ere the second closed, and the National principle which they had sought to smother rise up in great assertion and with a more splendid vitality than any one dreamed possible as the fourth decade began and the man who had done the deed sank into his grave in all the majesty of his eighty years.

How did John Marshall do this work, this statesman's work, as Chief Justice of the United States? It is all there in his decisions. To show it forth as it deserves would require a volume. Only an outline which will

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roughly mark out the highest peaks in the range is possible here.

The first blow was struck in 1803, in the famous case of Marbury against Madison. Marbury applied for a mandamus to compel Mr. Madison to deliver to him his commission as justice of the peace, which had been signed and sealed by Mr. Adams and withheld by his successor. Marshall held that the applicant had a right to the commission; that his right having been violated, the law of the country afforded a remedy; that the case in its nature was one for mandamus, but that being an original process, the Supreme Court had no jurisdiction, because the act of Congress conferring such jurisdiction, not being authorized by the Constitution, was null and void. He declared, in other words, that the Constitution was supreme, that any law of Congress in conflict with it was null and void, that the Supreme Court was to decide whether this conflict existed; and then, going beyond the point involved, he boldly announced that if the application had been properly made, the Federal court could compel the Executive to perform a certain act. At one stroke he lifted the National Constitution to the height of authority and made the tremendous assertion of power in the court, which he declared could nullify the action of Congress and control that of the Executive if the necessary conditions should arise. Small wonder is it that Jefferson was irritated and alarmed to the last degree, and that he complained bitterly of the manner in which the Chief Justice had traveled out of the record in order to tell the world that he might, if he so willed, curb the authority of the President. But the assertion of the supremacy of the Constitution and of the power of the court to decide

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a law unconstitutional has remained unshaken from that day to this.

In Marbury against Madison, Marshall asserted the supremacy of the Constitution and the power of the court in relation to the other branches of the National Government. But important and far reaching as this was, the vital struggle was not among the departments created by the same instrument. The conflict upon which the fate of the country turned was between the forces of union and the forces of separation, between the power of the Nation and the rights of the States. It was here that Marshall did this greatest work, and it was this issue that he desired to meet above all others.

In the case of the United States against Peters in 1809, he decided that a State could not annul the judgment, or determine the jurisdiction, or destroy rights, acquired under the judgments of the courts of the United States. Thus he set the National courts above the States, and he followed this up in the following year, by deciding, in Fletcher against Peck, that a grant of lands was a contract within the meaning of the Constitution, and that a State law annulling such a grant was in conflict with the Constitution of the United States, and therefore null and void. The United States courts, it was to be henceforth understood, were not only above and beyond the reach of State legislatures, but they could nullify the laws of such legislatures. No heavier or better directed blow was ever struck against State Rights when those rights were invoked in order to thwart or cripple the National power.

The trial of Burr in 1807, although not bearing upon the central principles to which Marshall devoted his best efforts, gave him an opportunity to define treason under the Constitution. On this memorable trial there can be

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no doubt that he stood between the accused whom the Government wished to destroy and the just popular sentiment which would have fain hurried Burr to the gallows. That Marshall's rulings were correct, and that he laid down the American law and definition of treason in a manner which subsequent generations have accepted, cannot be questioned. But this cannot be said of the famous ruling by which he granted the motion to issue a *subpœna duces tecum*, directed to the President of the United States. If his desire was to fill Jefferson with impotent anger and with a sense of affront and humiliation, he succeeded amply. In any other view the granting of the motion was a failure and a mistake, for instead of exhibiting the power of the court it showed its limitations. The Chief Executive of the Nation clearly cannot be brought to court against his will, for higher duties are imposed upon him, and still more decisive is the practical consideration that the court is physically powerless to enforce its decrees against the Chief Magistrate, by whom alone in the last resort the decrees of the court can be carried into execution. The animosity toward Jefferson which nearly led Marshall into the political blunder of supporting Burr in 1801 was the probable cause of this single mistake in his long management of the judicial power. Yet even though it was an error, it gives a vivid idea of the bold spirit which was able to make a limited court not only the bulwark of the Constitution, but the chief engine in advancing national principles during a long series of years, when every other department was arrayed against it and a hostile political party was everywhere predominant.

To assert the supremacy of the National Constitution over the constitutions and laws of the States was, how-

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ever, only half the battle, and was in its nature a defensive position. It was necessary not only to maintain but to advance. It was not enough for the Constitution to stand firm; it must be made to march, and this was done by a series of great decisions, through which Marshall developed and extended the constitutional powers and authority, not merely of his own court, but of the Executive and of Congress. In 1805, in the United States against Fisher, he found in the clause of the Constitution giving Congress the right to pass all necessary and proper laws for carrying into execution the powers vested in them by the Constitution, authority for a law making the United States a preferred creditor. In 1819 the Dartmouth College Case, the most famous perhaps of all Marshall's cases, was decided. In this he gave to the clause relating to the impairment of contracts, already used as the foundation of the judgment in the case of Fletcher against Peck, a vigorous reinforcement and extension. In holding that a State could not alter a charter derived from the British Crown in colonial times, the Chief Justice carried the constitutional power in this regard to an extreme, justifiable, no doubt, but from which a man less bold would have recoiled.

In the same year he pushed the same doctrine home in Sturges against Crowninshield, holding that a State could not pass an insolvent law releasing debts contracted before its passage.

In the still greater case of M'Culloch against Maryland, also heard at this time, he affirmed and extended the National power with one hand while he struck down the authority of the State with the other. No man could add much to the argument in which Hamilton defended the constitutionality of the National Bank, but Marshall

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presented it again in a manner equal to that of the great Secretary, and which carried with it an authority which only the court could give. He held the bank to be constitutional under "the necessary laws" clause, and in one of those compact, nervous sentences, so characteristic of the man, he defined once for all the scope of that provision, "Let this end be legitimate," he said, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." What an enlargement of National power is contained in these pregnant words! What a weapon did this single weighty sentence place in the National armory! The constitutionality of the bank being thus affirmed, the law of Maryland taxing its branches fell, of course, as null and void, for the power to tax is the power to destroy.

That profound legal thinker, Andrew Jackson, differed from Marshall on this question. He wrecked the bank, fostered the pet State banks, left the panic of 1837 to desolate business, and overwhelm his successor and his party in defeat. But although Jackson tore down the superstructure, upon the foundation laid by Marshall in an opinion, where the foresight of the statesman went hand in hand with the matchless reasoning of the lawyer, arose the National Bank system, which after forty years still stands before us unshaken and secure.

Two years later, in Cohens against Virginia, he held that the appellate jurisdiction of the Supreme Court extended to decisions of the highest State courts, and that a State itself could be brought into court when the validity of the State law under the National Constitution was involved.

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In 1824, in Gibbons against Ogden, he interpreted and breathed life into the clause giving Congress power to regulate commerce, and held unconstitutional a law of the State of New York which was in conflict with that clause. In so doing he overruled some of the ablest judges of the State of New York, and cut off a right hitherto supposed unquestioned. But he did not hesitate, and another extension of the National power followed.

In Craig and others against the State of Missouri, under the clause forbidding a State to emit bills of credit, he annulled a law of that State which authorized the issue of loan certificates which were held to come within the prohibited description.

In the Cherokee Nation against Georgia, he held that the Indians were not a foreign nation, and therefore not entitled to sue in the Supreme Court; and then, with his wonted felicity of phrase, he described them as a "domestic and dependent" nation dwelling within the boundaries of the United States and subject only to the laws and treaties of the central government — a proposition capable of wide application, and carrying with it possibilities of a great extension of the National authority. Following out this principle in the case of Worcester against Georgia, he held that a citizen of the United States going into the Cherokee country could not be held amenable to the laws of Georgia. The administration was out of sympathy with Marshall's views, the State of Georgia was openly defiant, yet after some months of delay the State gave way, the missionaries were released, and the court triumphed.

In this list of cases, so baldly stated, many have been omitted and none have been explained and analyzed as they deserve. But these examples, chosen from among

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the greatest and most familiar, serve to show the course which Marshall pursued through thirty-five years of judicial life. These decisions are more than a monument of legal reasoning, more than a masterly exposition of the Constitution, for they embody the well-considered policy of a great statesman. They are the work of a man who saw that the future of the United States hinged upon the one question whether the National should prevail over the Separatist principle, whether the Nation was to be predominant over the States — whether, indeed, there was to be a Nation at all. Through all the issues which rose and fell during these thirty-five years, through all the excitements of the passing day, through Louisiana acquisitions and the relations with France and England, through embargoes and war and Missouri Compromises, and all the bitter absorbing passions which they aroused, the Chief Justice in his court went steadily forward dealing with that one underlying question beside which all others were insignificant. Slowly but surely he did his work.

He made men understand that a tribunal existed before which States could be forced to plead, by which State laws could be annulled, and which was created by the Constitution. He took the dry clauses of the Constitution and breathed into them the breath of life. Knowing well the instinct of human nature to magnify its own possessions — an instinct more potent than party feeling — he had pointed out and developed for Presidents and Congresses the powers given them by the Constitution from which they derived their own existence. Whether these Presidents and Congresses were Federalist or Democratic, they could be certain, as they were human, to use sooner or later the powers disclosed to them. That

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which Hamilton in the bitterness of defeat had called "a frail and worthless fabric," Marshall converted into a mighty instrument of government. The Constitution which began as an agreement between conflicting States, Marshall, continuing the work of Washington and Hamilton, transformed into a charter of National life. When his own life closed his work was done — a nation had been made. Before he died he heard this great fact declared with unrivaled eloquence by Webster, although the attitude of the South at that moment filled him with gloomy apprehensions and made him fear that the Constitution had failed.[1] It was reserved to another generation to put Marshall's work to the last and awful test of war, and to behold it come forth from that dark ordeal triumphant and supreme.

What of the man who did all this? The statesman we know, the great lawyer, the profound jurist, the original thinker, the unrivaled reasoner. All this is there in his decisions and in his public life, carved deep in the history of the times. But of the man himself we know little; in proportion to his greatness and the part he played we know almost nothing. He was a silent man, doing his great work in the world and saying nothing of himself, to a degree quite unknown to any of the heroes of Carlyle, who preached the doctrine of silence so strenuously in many volumes. Marshall seems to have destroyed all his own papers; certainly none of consequence are known to exist now. He wrote but few letters, if we may judge from the voluminous collections of the time, where, if we except those addressed to Judge Story, lately published,

[1] See Letters to Story, Proceedings of Massachusetts Historical Society for October, 1900.

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he is less represented than any of the other leaders of that period. Brief memoirs by some of his contemporaries, scattered letters, stray recollections and fugitive descriptions are all that we have to help us to see and know the man John Marshall.

Yet his personality is so strong that from these fragments and from the study of his public life it stands forth to all who look with understanding and sympathy. A great intellect; a clear sight which was never dimmed, but which always recognized facts and scorned delusions; a powerful will; a courage, moral, mental and physical, which nothing could daunt; all these things lie upon the surface. Deeper down we discern a directness of mind, a purity and strength of character, a kind heart, an abundant humor and a simplicity and modesty which move our admiration as beyond the bounds of eulogy. He was a very great man. The proofs of his greatness lie all about us — in our history, our law, our constitutional development, our public thought. But there is one witness to his greatness of soul which seems to me to outweigh all the others. He had been soldier and lawyer and statesman; he had been an envoy to France, a member of Congress, Secretary of State and Chief Justice. He did a great work, and no one knew better than he how great it had been. Then when he came to die he wrote his own epitaph, and all he asked to have recorded was his name, the date of his birth, the date of his marriage and the date of his death. What a noble pride and what a fine simplicity are there! In the presence of such a spirit, at the close of such a life, almost anything that can be said would seem tawdry and unworthy. His devoted friend, Judge Story, wished to have inscribed upon Marshall's tomb the words "Expounder of the Constitution." Even this is something

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too much and also far too little. He is one of that small group of men who have founded States. He is a Nation-maker, a State-builder. His monument is in the history of the United States, and his name is written upon the Constitution of his country.

Banquet at the Auditorium.

A banquet was held at the Auditorium, Chicago, on the evening of February 4, attended by a representative body of judges, lawyers and laymen, John S. Miller, President of the Chicago Bar Association, presiding. Responding to the toast "John Marshall," Peter S. Grosscup, Judge of the United States Circuit Court, said in part:

More than that of any great American, the career of John Marshall impresses the public with the sense of mysticism. His work, in its essential details, is little known. By the people generally it is felt, rather than seen, that his personality imparted to our institutions their dominating note. More than any other, as he stands in history, he has the appearance of the prophet and seer. He is, in fact, the Inspired Prophet of the Republic. . . .

But the present is never without its premonitions of the future. Everywhere, in both peoples and in men, is the sense of destiny. A strange foresight possesses us. The mind has an eye of its own, and God's lanterns hang up in the corridors of Futurity.

The men who lived in Marshall's day were not without this sense of destiny. The Republic as we now see it — its commerce on every sea, its business on every land; its flag saluting the sunrise in the Phillipines at the moment it lowers to the sunset at Washington; its face turned always toward a sunlit sky; its population nearly one hundred million; its enterprise bulging into every valley

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and out of every port; its moral weight dominating the councils of the world — the Republic as we now see it was even then playing prophetic chords upon the imaginations of our fathers. Deep in their consciousness lay the nascent image of the America of to-day.

Marshall's nature was attuned to catch these strains of prophecy. He had the genius of the dreamer, and the logic with which to measure his dreams. His mental firmament over-arched his country's destiny. More than any contemporary, he realized its meaning; and that there was a work of preparation that must be done. He saw clearly that, individual rights remaining secure, and local affairs under local control, there must be found somewhere a means of massing the weight and power of the American people as a whole.

With Marbury *v.* Madison acquiesced in, the remainder of Marshall's work was well in hand. It covered the field of national dominion; it secured the inviolability of contracts; it protected, against every form of menace, the public credit; it extended the authority of National Government over interstate commerce; it fortified the National Government against local interference; it established the Nation's laws, and the decrees of her courts as the law of the land; it made us, in truth, a Nation; and thus put the people, as a whole, in full possession of their capabilities as a single, indivisible, power-wielding community.

Marshall's power was in his talent for exposition. He reasoned without developing heat. His judgment was poised like the balances on which fine gold is weighed; everything worth considering had its effect upon the scale. He was foiled by no subterfuge, and never stumbled over the driftwood. His mind went straight to the core of the matter. He was, in every sense, a master judge. . . .

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Marshall did not discover the element of nationality in our government. Nationality underlies the Constitution. It was Marshall's mission to interpret to the American people the genius of their government, and to build up the structure along its outlines. This was everything. It gave to Webster the text of his nation-building speech. It gave to Lincoln and our armies authority for their nation-saving triumphs. It was fitting that the Great Civil War should open and close within sight, almost, of the place of Marshall's birth; for both the doctrine that it extinguished, and the doctrine that it enthroned, can trace the hour of their crisis to the ascendency of his judicial personality. I finish as I began. John Marshall — mystical, fathomless, expounding our destiny as a messenger of God — is the Prophet of the Republic.

Responding to the toast, "The Nation and the States," James M. Beck, of Philadelphia, Assistant Attorney-General of the United States, said in part:

In nothing was John Marshall so surpassingly great as in the fact that he reached his wonderful conclusions, not by slavish and exclusive resort to precedent or analogy, but by reasoning which was both independent and logical. In many of his decisions he could in the nature of the case have no precedent to guide him, and perhaps their surpassing greatness may be in some measure due to this consideration. I do not mean that every judge should disregard precedent, for not every one can bend the "bow of Ulysses." But self-respect bids us remember that the Almighty never intended that wisdom should die either with one man, one generation, one race, one century, or one epoch. Least of any people should America doubt the increasing purpose of the ages and the widening of thought with the process of the suns.

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I mention this because, as I have said, our country is unquestionably entering upon a new phase of constitutional development. Problems which are entirely novel are confronting us at the beginning of the twentieth century as they confronted John Marshall at the beginning of the nineteenth. The United States is destined to be the dominant power of the world. Already the shadow of its coming greatness envelops the globe, while its flag waves to-night as a symbol of dominion in two hemispheres, and is illumined with the glory of unending day. The traditional policy which confined us to a single hemisphere has been discarded forever. We must meet these questions with the same breadth of view and independence of thought with which John Marshall met the questions of his day. Our duty as a nation is to be determined by present and not by past conditions. We cannot stand still; we must move onward. From civilization we derive inestimable rights; to her we owe immeasurable duties, and to shirk these would be cowardice and moral death. The greater the power the greater the responsibility, and therefore no nation owes a greater duty to civilization to be potential in the councils of the world than the United States. For it to skulk behind the selfish policy of isolation and abdicate a destined world-supremacy would be the colossal crime of history.

If our people and those temporarily charged with authority have but the spirit of John Marshall, no problem to confront us will prove too great for our solution and no work too great for our achievement. To faintly grasp the future of this country is to bewilder and exhaust the imagination. East and west from the Father of Waters, north and south of Mason and Dixon's line, we are one to-day, my fellow countrymen, one in the proud posses-

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sion of a glorious past, one in a resolute purpose to meet the duties of the hour, and one in an abiding faith in the future of our beloved country. The spirit of America is that voiced by Montalambert, when he said, "Bowing respectfully to the past, and doing justice to the present, we salute the future and true progress."

To the toast "Illinois and the National Government" Henry D. Estabrook, of the Chicago bar, in the course of his remarks said:

In that death grapple between sections of this country known as the Rebellion, sectionalism itself was exterminated, and the dream of Hamilton, the hope of Washington, the prayer of Marshall were realized in a National Union, free, sovereign and indissoluble.

It is possible that no State contributing to this result could have withdrawn its contribution without changing the result; for the issue hung for years in an agony of doubt. Every one of these States, therefore, has a right to self-gratulation, even to claiming that, except for its own loyal and heroic sacrifice, the Union, such as it was, would have been shattered into bloody fragments; while the Union, such as it is, would have remained as Utopian as the vision of a poet.

But detracting no whit from the glory of any State, I am justified by history in affirming that the power, mental and material, which dominated events in this psycho-physical convulsion of our nation came from the West; and that in this western galaxy the star of Illinois shone resplendent over all — "softly sublime, like lightnings in repose." Eliminate from the Union Illinois' part in it, and you not only blot out the Union, but you impoverish history and rob humanity of some of its dearest heroes.

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To the toast "Centennial Days: Milestones in a Nation's History," Emil G. Hirsch of Sinai Temple, Chicago, responded in part as follows:

Many may protest that the readiness with which we accept the invitation to aureole in glory one or the other of our dead leaders betokens weakness inherent in a race of easily influenced hero worshipers. Or grumblers of another kind may sneer at our fanaticism of reverence and point out that upon closer inspection our much lauded heroes were after all human and shared with our own clay the imperfections of passion and performance which is our own limiting bane. Notwithstanding this cacophony of this censorious and cynic chorus, one who genuinely is on terms of intimacy with the needs of the human soul of the individual and of the nation will have no reason to doubt the efficacy of the nobler ambitions of these memorial occasions. Rehearsing the lives of our great men we ourselves cannot but be made stronger and nobler.

James B. Bradwell, Editor of the Chicago Legal News, with a few appropriate remarks concerning the extent and character of the celebration, offered the following resolution adopted by the Chicago Bar Committee, which was unanimously adopted:

Assembled at the Banquet Board in honor of John Marshall, Chief Justice of the United States, the Bar of Chicago congratulates one of its members, Adolph Moses, on the national adoption of his motion made before the Illinois State Bar Association, July 7, 1899, that the centenary of the installation of John Marshall as Chief Justice be celebrated by the Bench and Bar.

In every court of his country this day has been celebrated. The inspiration thus derived from the career and character of the great Chief Justice dignifies the bar, exalts the bench and strengthens the republic.

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His brethren, appreciating the zeal, enthusiasm and disinterestedness of their associate, Adolph Moses, are proud that through his efforts the Chicago Bar has the honor of originating this day's celebration.

JAMES B. BRADWELL. JOHN S. MILLER, *President.*
FRANCIS LACKNER,
ALEXANDER SULLIVAN,
Committee.

Chicago, Feb. 4, 1901.

An engrossed copy of this resolution, together with a medal, was presented to Mr. Moses on behalf of the Chicago Bar Association, inscribed "The Chicago Bar to Adolph Moses, proposer of the Marshall Centenary celebration, 1901." On the reverse side was the inscription "Who Honors Marshall Reveres the Constitution."

CELEBRATION AT SPRINGFIELD.

Exercises were held on Tuesday, the 5th of February, in the court room of the Supreme Court of the State. The court met in regular session. The General Assembly of Illinois attended the celebration in a body. The meeting was presided over by Jesse Holdom, President of the Illinois State Bar Association.

Introductory Address of Jesse Holdom.

This celebration is, with the generous sanction of this tribunal, held in the presence of this court in the Capitol building of our State, under the auspices of the Illinois State Bar Association, and like exercises have been held throughout the length and breadth of this land, and participated in by courts and lawyers, supplemented with the attendance of thoughtful citizens, as attentive hearers of the eloquent words which have been voiced in his praise.

It is a matter of no little pride to know that this great

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outpouring of respect and homage to the memory of the "Expounder of the Constitution" was first made possible by the action of the Illinois State Bar Association, and that the initial idea originated with Mr. Adolph Moses, one of its members.

We of Illinois have an additional interest and pride in this celebration in the fact that the seat of the great Chief Justice has been for the past ten years filled by Melville Weston Fuller, a citizen of this State, whose name is enrolled as an attorney of this court, whose eloquent voice has often been heard within these walls in the argument of important legal causes. He also sat in the old State Capitol as a member of the House of Representatives and has left his impress in the formation of the early statutes of this State.

In honor of the day and the event commemorated, all the courts of the country — with some few insignificant exceptions — stood adjourned from the transaction of legal affairs.

We are highly favored in having with us as the orator of the day a native of the same State as Washington and Marshall — a jurist who has expounded the laws and the Constitution as Chief Justice of a court of *dernier resort* in a sister State; a statesman who has a seat in the most distinguished legislative body known to our time; a gentleman of learning and culture; an orator of national reputation; a kindly, generous man, who has traveled from the nation's capitol to the home of the great Lincoln to afford us the pleasure of hearing his eloquent tribute to the memory of "John Marshall." I have the honor — and it gives me more pleasure than I can find suitable words to express — to present to this court as the orator of the day, Senator William Lindsay of the State of Kentucky, whose theme is "John Marshall."

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Oration of William Lindsay.

For the honor of appearing in this august and dignified presence, and for the opportunity of addressing this distinguished audience, I owe the Bar Association of Illinois my profound thanks.

We do not meet to celebrate the services of a great military chieftain, or the triumphs of a successful political leader. In the common acceptation of the term, John Marshall was neither a hero, nor a leader of the people. He was never the idol of the day. His life and labors were not on lines that excited enthusiasm or challenged popular applause; but combining his personal characteristics, his services and the grandeur of their results, he typified, as few men have done, the fact that "Peace hath higher tests of manhood than battle ever knew." A country lawyer, without ambition for personal advancement, he avoided office and accepted public trust only from a sense of duty. In the walks of his profession he ripened, unostentatiously and gradually, into one of the profoundest jurists of his day, and, as opportunity came and occasion demanded, proved himself among the greatest judges of modern times.

It was said by Socrates that "Four things belong to a judge — to hear courteously, to answer wisely, to consider soberly, and to decide impartially;" and by Locke, "He that judges without informing himself to the utmost that he is capable, cannot acquit himself of judging amiss." These tests, each and all, may be applied to Marshall, and his judicial career failed in no respect to meet them in letter and in spirit.

The world has builded monuments to her rulers and to her soldiers; the books are full of eulogies of statesmen and of tributes to those who have distinguished them-

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selves in the walks of literature and science; but in all history there is not a parallel to the demonstrations of yesterday and to-day, in memory of a man who, during the life of a generation, almost withdrawn from the gaze of the world, wrought out a work which is to endure as long as the American people shall cherish free institutions, and constitutional government shall be preserved. Respect for the American theory of liberty, regulated by law, inspired the thought of "John Marshall Day," and invoked the movement resulting in the numberless demonstrations in honor of the American judge who pointed the way through which supreme authority may be freely exercised, while constitutional limitations continue to be observed. The lessons these demonstrations teach are incalculable in value as they are elevating and ennobling in results. The good, the great and the useful in the fields of beneficent action would live in vain if the memory of their deeds should be permitted to fade into dim forgetfulness.

We are told by Carlyle, in his inimitable style, that "Great men, taken up in any way, are profitable company. We cannot look even imperfectly upon a great man without gaining something by him. He is the living light fountain, which it is good and pleasant to be near. The light which enlightens; which has enlightened the darkness of the world, and thus, not as a kindled lamp only, but rather as a natural luminary shining by the gift of Heaven; a flowing light fountain . . . of nature, original insight of manhood and heroic nobleness, in whose radiance all souls feel that it is well with them."

In this spirit we take up Marshall. With this sentiment we look on his history, and contemplating the record

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of his deeds see him as though he were yet a living, moving, controlling factor in the affairs of men. We cannot look on him even thus imperfectly without gain, or fail to realize that the light which, two generations ago, was enkindled through him in the realms of constitutional law and of international and municipal jurisprudence, still shines with undiminished vigor. Judges and lawyers, statesmen and politicians, the learned of all classes of society, feel to-day as they never felt, that it is good to contemplate Marshall and pleasant to be near the light he left burning when his mortal career was closed, which light will continue to illumine the judicial way as long as American institutions shall live.

Up to his appointment to be Chief Justice of the Supreme Court of the United States, Marshall's career had not been marked by services sufficiently exceptional to attract to him the public attention his personal worth and capacity deserved. His earlier manhood was spent in the formative period of the republic, an age abounding in men of eminence and distinction. His opportunities were limited and his native modesty obscured for the time his intellectual and moral greatness. A minute-man in 1775, a lieutenant in the Continental line in 1776, a captain in 1777, he participated in the battles of Brandywine, Germantown and Monmouth, and shared the privations and hardships in the winter which gave to Valley Forge its historic interest.

Retiring from active participation in the war of the Revolution, when his services could no longer be profitably utilized, he turned his attention to the profession in which, in the course of events, he was to achieve the most unexampled success. He began his professional life in Richmond, the metropolis of the then leading American

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Commonwealth. He served his State in its legislature, and was a member of the convention through which Virginia ratified the Federal Constitution. Convinced by experience that under the Articles of Confederation the General Government was utterly inadequate, he advocated a supreme authority, perfectly and efficiently organized. He was an earnest advocate of the ratification of the plan proposed by the convention over which Washington presided, and of which Madison was a leading member. He realized that the Confederation was approaching its dissolution and then had but a nominal existence. He acted with Washington, Madison, Randolph, Nicholas and their associates unmoved by the eloquence of Henry and unawed by the predictions of those who could see, or supposed they could see, in the adoption of the Constitution the ultimate destruction of the States and the centralization of all power in the Federal Government.

He appreciated the necessity for, and earnestly advocated the creation of, a government possessing the power not only to make treaties, but to compel their performance; to lay taxes and enforce their collection; borrow money and provide for its payment; regulate commerce with foreign nations and among the States; establish and support postoffices and post roads; raise and support armies, provide and maintain a navy, and do and perform all those indispensable acts and things for which provision had been apparently made by the Articles of Confederation, but which the central government was without the means of doing or performing. He did not fear that the independent and, in some respects, omnipotent, judiciary, to be called into existence by the Constitution, would place the Federal Government above and beyond the control of the people. On the contrary, he believed that the

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great powers of the judiciary were indispensably necessary for the protection of the people against the abuse of authority by the legislative and executive departments.

It is hardly possible, though he may have looked forward to the time when, under his leadership as its first officer, the Supreme Court would demonstrate that judicial power which extends to all cases in law and equity arising under the Constitution and laws of the United States, and under treaties made or which might be made under their authority; to all classes of admiralty and maritime jurisdiction; to controversies to which the United States might be a party, and to controversies between two or more States, was among the most conservative and republican features of the new plan of government.

In May, 1800, he was offered the place of Secretary of War. Before the end of the year he was made Secretary of State, and January 31, 1801, was appointed Chief Justice of the United States.

If his career had then terminated, his name would have gone down in history with the honor and respect attending those who, standing above their fellows in moral and intellectual greatness, have met responsibilities with unfaltering courage, and discharged the duties of life with that conscientious devotion which distinguishes the patriotic citizen and embellishes the character of the Christian gentleman. Fortunately, for his country and for future ages, the Chief Justice was given yet thirty-four more years of life.

By his genius and learning he explored the mysteries of the Federal Constitution and brought to the light of day the hidden wisdom that lay concealed within its bosom.

It is a common remark that to him we are indebted for

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the Constitution; that he was not merely its expounder, but its author and creator; that he raised it from a doubtful experiment to a harmonious, permanent and beneficent system of government. This is at once mistaken eulogy and misdirected praise.

With the conception and preparation of the plan of government embodied in the Constitution he had no direct or immediate connection. He was in no sense the author or creator of the plan. The Constitution, with its marvelous virtues and possibilities, was the product of compromise and concession. It was not what any member of the convention would have made it, and probably demanded the unqualified approval of no one of the distinguished men who eventually signed it. It came in obedience to inexorable necessity, and would not have been adopted but for the conviction that its rejection would precipitate a catastrophe, the consequences of which no one could foresee.

The Chief Justice recognized that it was his duty to interpret, to construe, not to create, the Constitution, and that he had no right to add to or subtract from its most unimportant provision. The courts have no concern with the Constitution except to discover its meaning and to apply that meaning to the causes that from time to time come before them for adjudication. No one realized or appreciated these truths more sensibly than Chief Justice Marshall, and no judge more conscientiously refrained from the creation of either constitutional or statutory law.

He came to a work original and unexampled in its character and importance. The time during which the Constitution had been in force before his induction into office had been barely sufficient for the organization of the ju-

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dicial system. But few constitutional questions had been passed on by the Supreme Court.

I quote from an eminent lawyer, a cotemporary and personal friend of the Chief Justice:

"At the date of his appointment the Constitution had been more frequently discussed in deliberative assemblies than in the Supreme Court of the United States. Circumstances had not yet called for the intervention of that court upon questions opening the whole scheme of the Constitution, and thereby determining the rules for its interpretation; nor had anything of previous occurrence established the meaning of some of the most important provisions which restrained the powers of the Constitution. . . . It is true of the time when this appointment was made, that, in many parts of the greatest difficulty and delicacy, it had not then received judicial interpretation."

At the close of the administration of the elder Adams, party spirit had reached its climax. Differences in politics so far obscured the ancient relations of personal friendship between the outgoing and incoming President that its affectionate character was not restored until old age had mellowed in each the resentments of party antagonisms. Adams retired from office under a cloud of unpopularity, which we of to-day find it impossible to comprehend. The new Chief Justice, his supporter and appointee, inherited a full share of the bitterness that had been poured on the head of the administration.

John Marshall had never been partial to Thomas Jefferson, and had no sympathy with his opinions or policies. Jefferson regarded Marshall's theories of government as hostile to the local supremacy of the States and dangerous to liberal institutions. No two men did more to develop

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and direct constitutional government, but in working out the great problem neither disguised his hostility to or his want of respect for the other. Jefferson's friends complained that the opinion in Marbury *v.* Madison was an extrajudicial attack on the President, and in view of the adjudged want of jurisdiction in the court, there was apparent foundation for the complaint. On the other hand, the rulings of the Chief Justice in the trial of Aaron Burr were made the pretext for organized calumny and abuse, admitting neither excuse nor extenuation.

Repelling insinuations made in argument by counsel representing the Government, the Chief Justice took advantage of his charge to the jury in that case to pronounce these memorable words:

"Much has been said in the course of the argument on points on which the court feels no inclination to comment particularly, but which may perhaps not improperly receive some notice. That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case, if there is no alternative presented to him but dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

This was not the wail of a man appealing for temperate consideration, or for justice, but the defiance of a judge whose courage and fortitude were equal to his sense of duty, and whose resolution was that, so far as he was

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concerned, the law should be vindicated, though its minister be sacrificed. It was responsive to the injunction from on high to those who sit in judgment, "Ye shall not respect persons in judgment, but ye shall hear the small as well as the great; ye shall not be afraid of the face of man."

The key to John Marshall's character was that he was not "afraid of the face of man." His sublime courage, his discriminating judgment, his judicial temperament, his directness and simplicity of statement, his irresistible and irrefutable logic, combined to prepare him for the position he ultimately reached in public estimation — the first and the greatest interpreter and expounder of the Federal Constitution and of the checks and balances of the complex system of government resulting from its adoption.

The cases in which he established for himself the reputation of the greatest constitutional lawyer of the country did not reach the court of final resort until time had tempered the acerbity of party controversy, and personal antagonisms had measurably passed into oblivion. The people had virtually become all "Republicans" and all "Federalists" in their devotion to constitutional government. The harmony of social intercourse appealed for by Mr. Jefferson in his first inaugural address had been restored, and the courts approached the consideration of questions arising under the Federal Constitution with the calmness and deliberation their dignity and importance required.

The time came for the discussion of the Constitution in the tribunal clothed with the power and charged with the duty of its authoritative exposition. The nature and extent of the powers delegated to the General Government

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and the limitations imposed by the Constitution on the States ceased to be mere matters of popular or academic controversy. They became practical issues, affecting not only State and Federal officials in the discharge of their respective duties, but the industrial and business pursuits of the people. The States were naturally jealous of the importance of the Federal Government, and impatient on account of the restraints the Constitution imposed on their original powers. State officials were reluctant to abandon the exercise of authority which a few short years before was undisputed, and resented the claim that there were other limitations than those plainly and expressly set out in the covenant through which the "more perfect union" had been instituted.

Two theories of constitutional construction were kept before the country by those who, on the one hand, were inclined to magnify the powers and importance of the central authority, and those who, on the other, insisted that, at the most, the Constitution was but a league between sovereign States, and the Federal Government but the common agent of the original sovereigns.

The utilization of steam as a practical motive power gave occasion for the great case of Gibbons *v.* Ogden, involving the fundamental question whether New York could constitutionally grant to certain named individuals the exclusive right to navigate the waters of that State by vessels propelled by steam. Speaking for the court, the Chief Justice announced a decision that for more than eighty years has successfully stood the tests of hostile criticism. For clearness of statement, for irresistible argument, as a specimen of legitimate interpretation and of comprehensive analysis, the opinion of the court remains unexcelled in the literature of constitutional law.

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In the consideration of the relative authority claimed for the Federal and State governments, respectively, over questions of commerce among the States, the court, in language luminous and convincing, if not conclusive, announced the rule of constitutional interpretation.

After referring to the cases of Gibbons *v.* Ogden and Martin *v.* Hunter's Lessee, the orator proceeded:

The excuse I offer for these copious extracts is the recognized difficulty of abbreviating that which Marshall and Story have reduced to the last analysis, and the impossibility of stating with their accustomed clearness and perspicuity the fundamental rules of interpretation, which, under the leadership of the Chief Justice, the court of ultimate resort has applied and continues to apply to that supreme law, in the light of and in conformity to which all other laws, State and National, are to be read, expounded and administered.

Interpretation, exposition and construction. This was the work to which Marshall gave his great powers, with the most unsparing labor. He invented no new rules of interpretation, he resorted to no strange or hitherto unknown canons of construction. Artificial reasoning was as foreign to his nature as was the fear of adverse criticism, when declaring the conviction to which patient investigation and sound judgment pointed the way. With him as its chief, the great court brushed aside the phantom of judicial encroachment on legislative functions, which some of those who opposed the adoption of the Constitution had vigorously pressed on the attention of the people.

In the first case in which the court (after Marshall became Chief Justice) adjudged the invalidity of a Congressional enactment, as outside of constitutional warrant, it

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also declined to exercise the jurisdiction the invalid statute had attempted to confer.

To the question whether an act of Congress repugnant to the Constitution binds the courts and obliges them to give it effect, it was answered that:

"If this law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide that case comformable to the law, disregarding the Constitution, or comformable to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. If then, the courts are to regard the Constitution, and the Constitution is superior to an ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

This answer seems axiomatic to the lawyer of to-day, but it did not appear so to the lawyer of a hundred years ago. In 1785 the legislature of Rhode Island impeached the judges of that State for their temerity in refusing to enforce unconstitutional legislation, and in 1807 and 1809 Ohio judges were impeached for a like offense. Patrick Henry, in the Virginia Convention, expressed doubt as to whether the Federal judiciary would have the courage to declare Congressional legislation unconstitutional. Speaking for the Virginia judges who had done so, he exclaimed:

"Yes, sir; our judges opposed the act of the legislature. We have this landmark to guide us. They had the fortitude to decree that they were the judiciary, and they oppose unconstitutional acts. Are you sure that your Federal judiciary will act thus? Is that judiciary so well constituted and so independent of other branches as our

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State judiciary? Where are your landmarks in this government? I will be bold to say that you cannot find any. I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."

A quiet and unobtrusive Richmond lawyer, who sat in that Virginia convention — a colleague of the eloquent Henry — fifteen years later established the landmarks inquired for and proved to the country that the Federal judiciary was so well constituted that it had the fortitude and courage to oppose unconstitutional legislation; and better still, the moderation and forbearance to decline jurisdiction not conferred by the Constitution, and which Congress, though it might proffer, had no authority to confer.

Asserting the power and duty of opposing Congress, when the Constitution so required, the Supreme Court set the example of restraining itself, and confidence, though said to be a plant of slow growth, soon became the connecting link between the people and that high tribunal.

Convinced that the judiciary was the guardian of the Constitution, and that in consequence of such guardianship the government of the Union is a government of laws and not of men, confidence ripened into respect and admiration, and the Supreme Court insensibly secured and assumed the position intended for it by the framers of the Constitution. It took its place as a coordinate department of government, with a hold on the people as strong as that of any other department. This hold has been maintained through all the changes, all the upheavals and all the trying contests of the century which has just been transformed into "the eternal landscape of the past."

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It is not fair to say that the court had failed in securing public confidence up to the advent of John Marshall as its Chief Justice. It is not, however, unfair or unjust to say that public attention had not been specifically directed to its field of labor, and that the litigation it had theretofore considered had not been of the character and importance to attract general public notice, in the face of the political interests excited by the law-making department, and the personal consideration enjoyed by the eminent men who had occupied the chief executive office of the Union.

From February 4, 1801, till his death on July 6, 1835, as far as it was possible, Marshall sank his personality in the court of which he was the presiding justice. As a public character, he was no longer one of the people. As the Chief Justice, he was the concrete representative of the law. Through him and through the great court of which he was the acknowledged leader the law of the land day by day pronounced its judgments, and before he was called to his eternal rest the Constitution, which at the beginning appeared an undeveloped skeleton, took on the form of consistence, beauty and harmony, and from an apparently tongueless automaton became a breathing, speaking and directing potentiality.

Viewed from our present standpoint, we see that the Constitution as the plan of government is as remarkable for its arrangement of subjects as for the concise and appropriate language in which the will of the people is expressed.

It was happily said on a great occasion by David Dudley Field, that there is scarcely another instrument to which the rule *noscitur a sociis* can be better applied for

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its interpretation. This rule the Chief Justice and his associates for thirty-four years applied with undeviating fidelity and comprehensive intelligence. From Marbury *v.* Madison to Barron *v.* Baltimore, the last case in which the Chief Justice, as the organ of the court, discussed a constitutional question, the work, not of creation, but of development, steadily progressed in the manifestation of the true character and capabilities of the plan of government, which, at the time of its adoption, was understood and appreciated by scarcely a tithe of those who participated in its creation.

It would be out of place to attempt, and the occasion will not permit, an exhaustive review of the connection of the Chief Justice with our judicial system or of his labors in harmonizing and developing that system. He was a party man but not a partisan. He distinguished clearly between principles and policies. A Federalist of the school of Washington, he was as moderate in the expression of his views as he was steadfast and inflexible in defending them. Popular clamor could neither move him from the line of duty as he saw it nor seduce him into a course that did not commend itself to his judgment and his conscience. He and his associates on the Supreme Bench were not the favorites of the administration that came into power a month after he assumed the office of Chief Justice. If, for thirty-five years, the national executive and the national legislature were not the unfriendly critics of the court, they certainly were not its partisans or apologists. It is probably better for the country and for the court that such was the case. Opposition promoted the independence of the individual judges, and tended to define and establish the extent of judicial authority, and to mark the lines of judicial duty with technical accuracy and precision.

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Under the leadership of Marshall, the court rejected the dogma of strict construction, but did so without accepting or adopting its counterpart. Hamilton defines the rules of legal interpretation to be the rules of common sense, adopted by the courts in the construction of laws. The deliverances of the Chief Justice in Gibbons *v.* Ogden, Cohens *v.* Virginia and Osborn *v.* The Bank afford striking examples of the application of common sense in the interpretation of the organic law. To say that "men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey," and that the makers of the Constitution "must be understood to have employed words in their natural sense, and have intended what they have said," joins conviction with simplicity and appeals directly to the common sense of the layman as well as the lawyer, and of the uncultured man as well as the scholar. Such rules do not conflict in principle with Mr. Jefferson's rule, that, on every question of constitutional construction, we should carry ourselves back to the time when the Constitution was adopted, and recollect the spirit manifested in the debates, instead of trying what meaning may be squeezed out of the text or invented against it, and conform to the probable one in which it was passed. Nor with his other rule, that "when an instrument admits of two constructions — the one safe, the other dangerous; the one precise, the other indefinite — I prefer that which is safe and precise."

No man has figured in American affairs who understood better or more thoroughly appreciated the fact that "truth makes all things plain," and against the truth as Chief Justice Marshall presented it, casuistry and ingenuity struggled in vain to secure a foothold. It

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was said by William Wirt that no one could mistake his style — "the words so completely matched the thought." The justice of this epigram is exemplified in the compendium of constitutional construction expressed by the Chief Justice in his dissenting opinion in Ogden *v.* Saunders — "the intention of the instrument must prevail . . . this intention must be collected from its words . . . its words are to be understood in that sense in which they are generally used by both those for whom the instrument was intended . . . its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers."

Dignified, concise and complete, the accuracy of the conclusions are equaled only by the simplicity and clearness of the statement.

The Chief Justice was a steadfast defender of the theory that the authority of the United States was derived from the people, but he did not agree with those who argued from this postulate that the grants were made by the people disassociated from their relations to their individual States. When this claim was pressed on his attention he responded that "No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people in one common mass; of consequence, when they act, they act in their States."

He did not agree with those who claim that the States were never separately sovereign or individual, but independent only as members of the American Union, before, as well as after, the acceptance and adoption of the Constitution. He considered the original Confederation a league of sovereign and completely independent States,

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but held that the Union, under the Constitution, created a government which, though limited in its objects, is supreme with respect to those objects. He did not differ from Mr. Jefferson's theory that "our citizens have wisely formed themselves into one nation as to others and several States as among themselves. To the United States belong the external and mutual relations; to each State severally the care of our persons, our property, our reputation and religious freedom."

Miss Martineau, who was in Washington the last winter of the long service of the Chief Justice, describes him and the Supreme Court in these words:

"At some moments this court presents a singular spectacle. I have watched the assemblage while the Chief Justice was delivering a judgment; the three judges on either hand, gazing at him more like learners than associates; Webster, standing firm as a rock, his large, deep-set eyes wide awake, his lips compressed, and his whole countenance in that intense stillness which instantly fixes the eye of a stranger. Clay, leaning against the desk, in an attitude whose grace contrasts strangely with the slovenly make of his dress, his snuff-box unopened in his hand, his small gray eye and placid expression carrying an expression of pleasure, which redeems his face from its unaccountable commonness. The Attorney-General, his fingers playing among his papers, his quick black eyes and thin, tremulous lips for once fixed, his small face, pale with thought, contrasting remarkably with the other two. Those men, absorbed in what they were listening to, thinking neither of themselves nor of each other, while they were watched by the groups of idlers and listeners around them. The newspaper corps, the dark Cherokee chiefs, the stragglers from the far west,

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the gay ladies with their waving plumes, and the members of either House that had stepped in to listen. All of these have I seen at one moment constitute one silent assemblage, while the mild voice of the Chief Justice sounded through the court."

Marshall, Webster, Clay, and the Associate Justices, the Senators and Representatives, the gay ladies, the newspaper men, the dark Cherokees, and the English woman who caught and preserved the picture, have long since gone to their last accounts, but the scene breaks on our eyes to-day as vividly as it appeared to those who beheld it sixty-five years ago. The mild voice of the great Chief Justice still sounds through the high court, yea, through the courts of all enlightened countries, and will continue to sound as long as wisdom and justice and reason shall travel hand in hand with the law.

The name of Marshall is so inseparably connected with the court over which he for so many years presided that it may not be inappropriate to consider for a moment the character and dignity of that court. Its jurisdiction, original and appellate, extends to all cases in law and equity arising under the Constitution and laws of the United States and of treaties made under their authority. To all cases affecting ambassadors, ministers and consuls, to all cases of admiralty and maritime jurisdiction, to controversies between two or more States, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects. No other court compares with it in jurisdiction, power or independence. Writing concerning the Supreme Court when Marshall was yet the Chief

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Justice, De Tocqueville, having first referred to its general jurisdiction, continued:

"In the nations of Europe the courts of justice are only called upon to try controversies of private individuals; but the Supreme Court of the United States summons sovereign powers to its bar. When the clerk of the court advances to the step of the tribunal and simply says, 'The State of New York *v.* The State of Ohio,' it is impossible not to feel that the court which he addresses is no ordinary body, and when it is recollected that one of those parties represents one million and the other two millions of men, one is struck by the responsibility of the seven judges, whose decision is about to satisfy or disappoint so large a number of their fellow-citizens. . . . The peace, the prosperity and the very existence of the Union are vested in the hands of the . . . judges."

For the organization and leadership of this court, with its unparalleled powers and far-reaching authority, Marshall seems to have been specially set apart by nature. He may not have been as deeply read in the literature of the law as some of his professional brethren, or as some of his judicial associates; in statecraft he may have had his superiors; in constructive ability he was not the equal of Hamilton, and as a political philosopher was inferior to Jefferson; but no man of his day, not even Madison, was more thoroughly imbued with the spirit of the Constitution or more familiarly acquainted with the causes that led to its formation, or with the ends and purposes it was intended to accomplish, or more capable of applying its provisions to the events that necessarily followed its adoption. If it be true, as was said by one of his friends, that a truly great judge belongs to an age of political liberty and public morality, and is the representative of

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the abstract justice of the people, it is equally true that when Marshall was made Chief Justice the age and the occasion and the great judge came together.

It was said of him by an eminent Englishman that "his work of building up and working out the Constitution was accomplished not so much by the decisions he gave, as by the judgments in which he expounded the principles of these decisions; judgments which for their philosophical breadth, the luminous exactness of their reasoning and the fine political sense which pervaded them, have never been surpassed and rarely equaled by the most famous tribunals of modern Europe or of ancient Rome. He grasped with extraordinary force and clearness the cardinal idea that the creation of a National Government implies the grant of all such subsidiary powers as are requisite to the effectuation of its main powers and purposes; but he developed and applied this idea with so much prudence and sobriety, never treading on purely political grounds, never indulging the temptation to theorize, but content to follow out as a lawyer the consequences of legal principles, that the Constitution seemed not so much to rise under his hands to its full stature, as to be gradually unveiled by him, until it stood revealed in the harmonious perfection of the form which its founders designed."

Not alone in the field of constitutional law did the Chief Justice excel. The novel character and the fundamental nature of the propositions involved in constitutional interpretation attracted attention that would not have been directed to a court with no authority other than that of applying and enforcing a system of jurisprudence, resting on precedent and statute, and venerable alone from the traditions of the past.

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International law, maritime and admiralty jurisdiction, the law merchant and all branches of municipal law were involved at one time or another in the litigation disposed of while Marshall was on the bench. I do not need to say that the opinions of the court, and notably those prepared by the Chief Justice, took rank with the best that came from the most enlightened courts of the world, and were everywhere, as they yet are, received as the highest authority. Independent of and aside from the unexampled jurisdiction necessarily following the power and duty of American judges to pass on the authority of the law-making power, Marshall, in the arena of pre-existing jurisprudence, rivaled Mansfield as a common-law judge, and surpassed Eldon as a chancellor.

He was not merely a great lawyer and a great judge, but as a lawyer and judge he shone with such resplendent greatness that the world has well nigh forgotten his accomplishments as a writer and his capacity as a statesman. . . .

It is not to be said that the opinions of Marshall have never been questioned or disputed. Several of them have been modified and some virtually overruled. Many who recognize his greatness as a lawyer and his superiority as a judge decline to accede to his reasoning in some instances, or to the justice of his conclusions in others. There is, however, a general — I may say almost universal — consensus of opinion, that he was entitled to the position he won in public estimation, as the ablest constitutional lawyer of his day, and the greatest judge the country has yet produced.

The problems arising out of our late treaty with Spain have awakened a new interest in constitutional law.

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Students are eagerly searching the opinions of the Supreme Court rendered while Marshall was the Chief Justice, and on every hand those opinions are being patiently and laboriously investigated, with the assurance that they will shed light on the difficult questions with which the executive, legislative and judicial departments of the government are now beset.

The great court over which Marshall presided, and the reputation and influence of which he did so much to establish, continues to perform its duties and exercise its functions as the arbiter of final resort in all cases of constitutional difficulty, and some of these interesting questions are now before it for adjudication.

It is fortunate that we have a tribunal commanding public respect and public confidence, the mandates of which the people accept without regard to political affiliations or to preconceived opinions. This tribunal has nothing to do with questions of policy, or with the motives of Congress, or with the wishes of the President. To the constitutional power of the legislative and executive departments the courts address their attention, and this is the beginning and the end of their duty and jurisdiction. In yielding obedience to the decrees of the courts we do not obey the judges, but the Constitution and the law, and obedience to law is the first duty of the citizen. Among the greatest, perhaps the very greatest achievement of Marshall, was his successful inculcation of this lesson. A lesson that elevates the law, promotes good order and insures the stability of government. As was impressively said by James Bryce, it forms the mind and temper of the people, trains them to habits of legality, strengthens their conservative instincts and their sense of the value of stability and permanence in political arrangement. It

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makes them feel that to comprehend their supreme instrument of government is a personal duty, incumbent on each of them, and familiarizes them with and attracts them by ties of pride and reverence to those fundamental truths on which the Constitution is based.

After he had served twenty-eight years on the Supreme Bench, Marshall, at the instance of his immediate neighbors, took his seat as a member of the convention called by Virginia to amend and reform the Constitution which she adopted in 1776. No such body of men ever came together in any other State of the Union. As members of that convention sat William Branch Giles, the Governor of the Commonwealth; Littleton W. Tazewell, a Senator in Congress; John Randolph, of Roanoke; Philip Pendleton Barbour, the statesman and jurist; Benj. Watkins Leigh, afterwards a United States Senator; James Madison and James Monroe, ex-Presidents of the United States; John Marshall, the Chief Justice of the Supreme Court, and many others who, though less famous, were distinguished for ability and learning. A contemporary writer, sketching the Chief Justice at this period, said of him that "his appearance was revolutionary and patriarchal. Tall, in a long surtout of blue, with a face of genius and an eye of fire, his mind possessed the rare faculty of condensation. He distilled an argument down to its essence." In this convention, speaking in defense of the county court system of Virginia, John Marshall gave expression to his conception of the character and duties of the judiciary in this language: "Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting. Between the most powerful individual in the community and the poorest and most unpopular. It is of the

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last importance that, in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity for this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The judicial department comes home in its effects to every man's fireside; it passes on his prosperity, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth until now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, corrupt and dependent judiciary."

If Marshall had no other claim on the American people, the utterances of these sublime sentiments would entitle him to perpetual remembrance.

His public life commenced with the Revolutionary War. He lived through the critical period of our country, from the close of that war to the organization of the government under the Constitution. Devoted to the union of the States, he was an ardent friend and supporter of the Constitution.

Without pretending to respect the voice of the people, emotionally or hysterically expressed, Marshall let no opportunity pass to announce that the people are the source of all power, and that their will within the limitations they have permanently established, when regularly and deliberately declared, is the law of the land. His theory of our government was: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the

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whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed is supreme and can seldom act, they are designed to be permanent. This original and supreme will organizes the government and assigns to different departments their respective powers. It may stop here or establish certain limits not to be transcended by those departments."

He did not reason after the manner of the philosophers, who deal alone with abstract principles. He did not express himself in the language of the poet. He did not attempt to show, nor did he believe, that the maxim, *Vox populi vox Dei*, is or ever was to be accepted as literally correct; but he always recognized that in free governments, sovereignty, in the most comprehensive sense, resides with and inheres in the people. Organized government embraces that portion of the original and illimitable power of the people they may choose to impart to the agencies they institute. Original sovereignty is one thing, delegated sovereignty another, and this distinction he never lost sight of. He realized to the fullest extent that:

"Power in the people is like light in the sun — native, original, inherent, and unlimited by anything human. In government it may be compared with the reflected light of the moon, for it is only borrowed, delegated, and limited by the intention of the people whose it is, and to whom governors are to consider themselves as responsible, while the people are responsible only to God; themselves being the losers if they pursue a false scheme of politics."

Constitutions do not create individual rights or impart

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them to those by or for whom constitutions are ordained. The rights of persons are original, not delegated.

Magna Charta, Bills of Right, the Petition of Right and our State and Federal Constitutions are intended to guarantee, preserve and protect those attributes of men that are inherent and indefeasible. Government is a necessity with civilized man, but it emanates from the sovereignty of the people and remains at all times subject to such changes and modifications as that sovereignty may decree. The philosophy, I may say the framework, of our government was thus epitomized by the great Chief Justice:

"When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceeded not from the people of America, but from the people of the several States; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument."

He was a "State's rights" man, in that he respected and on all occasions upheld the rights and powers reserved by the States and the people, but he undeviatingly advocated "the preservation of the General Government, in its whole constitutional vigor, as the sheet-anchor of our peace at home and safety abroad."

I am admonished by the hour that I cannot follow further the story of his great performances. Full of years and full of honors, he passed from life's labors to his eternal rest. His works live after him. They are the daily companion of every American lawyer and the *vade mecum* of every American court.

"His setting sun loomed out in cloudless splendor, as

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it sank below the horizon. The last light shot up with a soft and balmy transparency, as if the beams, while yet reflected back on this earth, were but ushering in the morn of his own immortality."

One further thought, and I shall have finished the task assigned me. Great as were the intellectual powers of Marshall, and pre-eminent as were the services he rendered as the first judicial officer of the Republic, he could scarcely have attained the commanding position conceded by his own and succeeding generations without the loyal, generous and earnest support of the profession which still delights to do him honor. The members of that profession have always taken an active part in the vicissitudes of society, and always exercised a dominating influence in public affairs. They do not constitute a class, privileged or otherwise. They come to the bar from every walk of life, and from every pursuit or avocation in which the people engage. They are always in touch with those from whom they spring. The advocates of order and regularity, they are the last to compromise with innovation. Revering precedent, they are naturally conservative. Believing in stable government, their conception of real freedom is subordination to the reasonable rules and regulations dictated by experience for the government of men, but they are also sticklers for the equal protection of the law, and for its due and regular administration.

With them the courts are the visible organs of legitimate authority, and the judges the personal representatives of the dignity and majesty of the law. Hence, it was not unnatural, it was to be expected, that from the beginning the eyes of the American bar should be turned to the high court whose jurisdiction and power exceeded

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that of any other judicial tribunal in the world. And when its decisions proved equal to the important questions it was called on to adjudicate, and its opinions spoke the language of exhaustive research, profound learning and exalted ability, the bar of the country took up the championship of the court and the defense of its great leader against the attacks of political opponents, and against the hostile criticisms of those whose business it was to denounce without consideration and to condemn without reason.

Identified with the court, as its officers and advisers, were such counsel as Webster, Tilghman, Rawle, Dexter, Wirt, Pinkney, Nicholas, Harper, Leigh, and a host of others whose fame reached every section of the country, and whose names gave character and standing to the American bar of the earlier days of the nineteenth century. Those exalted characters added luster to the court in which they practiced their profession, and inspired the public with confidence and respect for that august tribunal.

As their successors, we are here to reassert the continued and unabated adherence of the bar to the courts of our country, State and National, and to keep alive the memory of that great jurist, the purity of whose life, public and private, and the grandeur of whose judicial achievements portray, as they illustrate, all that is elevating and ennobling in the profession of which we are proud to be accounted members.

To the dignified, able and distinguished court in whose presence I stand, and at whose bar I have had the privilege and honor to speak to the Bar Association of Illinois, whose guest I am, and to all who have honored me by their presence to-day, I return, in the fullness of

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my heart, the thanks I find myself unable, fittingly and appropriately, to express in words.

At the conclusion of Senator Lindsay's address the court made a response through Chief Justice Boggs, ordering, on behalf of the court, that the address itself be entered of record. In the course of his response the Chief Justice said:

Response of Chief Justice Boggs.

It was a favorite expression of Mr. Carlyle that "the history of a nation is the biography of its great men."

The soldier who has carried the flag of his country to victory in the field of war, the sailor who has triumphed in battle on the sea, and the orator who correctly interprets and gives eloquent expression to the cherished ideas and beliefs of the people, have always aroused public enthusiasm, received ovations while living, and the anniversaries of the great events of their lives have been commemorated by their grateful countrymen.

The labors which ennoble the life and character of a great judge relate to and deal with the liberty, safety and security of life and person of the individual and the preservation of the rights of property of every person, natural or artificial, and, in a court of review, those labors, exacting and arduous, are performed in the seclusion of the conference room or the quiet of the chamber or library, and, though in their nature wanting in that which so readily attracts the attention or wins the plaudits of the busy citizen, equally demand, if a judge has proven worthy, upright, truly great, just and impartial in his position, that his biography, with that of the soldier, the sailor and the orator, should be deemed a part of the history of his race and his country.

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I do not, however, presume to attempt to add anything to what has been so eloquently and completely said of Chief Justice Marshall in the address of Senator Lindsay. Chief Justice Marshall knew how to be a great and dignified judge and at the same time a plain and unpretentious American citizen. He possessed a powerful mind and an incorruptible character, and to these qualities all parties and all beliefs can join in rendering tribute.

Exercises at Bloomington.

Marshall Day was appropriately observed under the auspices of the bar in the city of Bloomington, Illinois. The exercises consisted chiefly of an address by Isaac N. Phillips, of the Illinois Bar, delivered at the Coliseum, in that city, on the afternoon of February 4, 1901.

Address of Isaac N. Phillips.

John Marshall was probably the most intellectual man that ever sat upon the bench and administered the common law. This day marks the end of a hundred years since he assumed the duties of Chief Justice of the Supreme Court of the United States. It was his lot, during the plastic period of American institutions, to save to his countrymen, through constitutional interpretation, the best fruits of their great war for independence. His judicial labors were marked by a courage so absolute; by an intelligence so original, so penetrating and so logical; by a sweep of argument so cogent and conclusive, and by a literary style so terse and luminous, that they stand apart from all others in American judicial history. When we add that the constitutional problems which Marshall met were wholly new; that they were controlled

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by no precedents; that they were insoluble by the application of mere legal erudition; that they entered into the heated and virulent political discussions of an unsettled era, and that upon their proper and courageous solution probably depended the continuance of the tottering union of the States, it will be seen that John Marshall is entitled to a conspicuous place among the builders and defenders of the American nation.

The final biographer of John Marshall has not yet arisen. It is to be hoped the revived interest in the man and his work consequent upon this celebration of the centenary of his assumption of the office of Chief Justice may produce some utterance truly worthy of so great a theme. Whoever shall possess the genius to popularize Marshall's fame will do a work of infinite importance to American history. And here I speak of Marshall the Chief Justice, and of his work as such. Marshall the man is well enough known to those who care to read, and Marshall the judge is, indeed, a theme much discussed. Lawyers know of the causes he decided, and historians have hinted of the importance of his decision of them upon the course and development of American constitutional history, but no writer has traced out consecutively and fully the part which Marshall's great constitutional decisions played in assuring a permanent union of the States, and thereby securing free institutions to the American people.

Unfortunately, judicial labors are not of a character to attract popular applause. They seldom excite more than a temporary interest among the common people, and for this reason, so far as concerns popular appreciation, John Marshall yet remains the great unlaureled hero of early American history. We are all partakers of the bounty prepared by his genius and courage, and to-day it is fitting

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that we meet, as members of the bar, to revalue the great service rendered by this man to the jurisprudence of our country. Let us try to realize on this occasion something of what John Marshall was to his country and to American history, as distinguished from what he was simply to the particular litigants whose causes he heard and decided.

I am not unaware that hero worshipers frequently attribute to their heroes a greater influence then they really exert. Men are born with certain capabilities, but, however great a man may be, he acts, and can only act, within the iron walls of environment. A purely personal force may do much, but, after all, it finds its limitations in the facts and conditions about it. A masterful man acts upon, and in greater or less degree modifies, his surroundings, and his surroundings in turn react upon him and generally so deflect and modify his course as to make his final position and work a compromise. No man climbs completely over the fences of circumstance. Of course, a man of great power will find vastly wider play for his individuality than a weak man; but even the giants must take advantage of facts and turn aside for obstructions. When the mountains of opposition are too rugged to climb and too wide to tunnel, a wise man goes around them.

When Napoleon Bonaparte said "I make circumstances," if he intended thereby to imply that he had nothing to thank for his wonderful career except his own genius, he uttered a bombastic untruth. He did, perhaps, in a sense, make many circumstances and pretty large ones, but the great historic facts and social conditions which made the career of Napoleon possible he did not make. No one man made them; no thousand men made them; no million men made them; and yet it must be

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said that Napoleon took advantage of his opportunities and availed himself of the conditions of the society into which he was born in a way that only a master genius could have done. Were Napoleon now a living citizen of the United States, of the age at which he had arrived when he signed the treaty of Tilsit, his great executive ability might by this time have brought him to the head of some gigantic railway system; or his supreme gift of unscrupulous lying might ere now have made him a more successful manipulator of the stock market than Wall street has ever known; or, had his early lot been cast in darker lines, his hard and cruel heart and utter contempt for the rights of his fellow-creatures might by this time have made him a more successful train robber and a more blood-thirsty bandit than was ever Bob Younger or Jesse James; but emperor of the United States he could never have made himself, though he had combined the military genius of all the great captains of the earth. He, like all other men, would have worked within the limitations imposed by his age and time.

Therefore, if in the enthusiasm naturally inspired by this great occasion, I should seem to be attributing too great results to the labors of a single man, let me assure you once for all that I do not forget, though I cannot stop here to trace them, the exalted labors of the many other great Americans who, in many fields, co-operated with John Marshall in making our country the powerful and efficient Nation we to-day behold it.

Since it is my purpose to consider John Marshall more particularly as a judge,— as the great fountain of constitutional interpretation,— I may fittingly dispose of his early history and of his minor services in a few preliminary words. He was born September 24, 1755, at Ger-

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mantown,—a roadside village in Fauquier county,—Virginia. Biographers all agree that his family were of sturdy Welsh extraction. In early youth he appears not to have been a hard student. As a boy he was fond of the sports of the field. He dwelt with nature and loved and appreciated her beauties. A writer has described him at this period as "quiet and thoughtful in manner and full of a dreamy, poetic enthusiasm." He loved to wander alone in the trackless forests. He indulged the poetic longings natural to a great soul. He was a dreamer of dreams, and dreams sometimes outlast empires. . . .

Marshall first sat as Chief Justice on the first meeting of the court in the new capitol at Washington, February 4, 1801,— the hundredth anniversary of which day we are here gathered to celebrate.

In the course of this address I shall frequently speak of Marshall as though he had been himself the Supreme Court, and this I shall do deliberately and advisedly. Upon all questions of constitutional law, during a full third of a century, Marshall dominated the court over which he presided. He did not do this by craft, by bluster or by violence, but by the charm of a rare personality and by a power of cogent reasoning and common sense which are without parallel in judicial history. He was endowed with the wisdom to be right, and with the persuasive power to make the truth manifest.

To understand Marshall's distinctive work as Chief Justice, we must a little more fully consider the spirit of his time. The American Revolution furnished several distinct phases of thought and opinion calling for distinct types of leadership. First, we have the stage of fiery agitation, wherein men like Samuel Adams, James Otis and Patrick Henry are seen at the front. With this

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period Marshall, then but a boy, had little to do. Then came the actual conflict of arms, with the wise, steadfast and unconquerable George Washington leading his countrymen to independence and honor. Here Marshall took an honorable though subordinate part. Then came the seven years' agony of our history, during which the central authority was slowly perishing, and anarchy, hydra-headed, was rising upon its ruins. Those having the statesmanlike instinct were aghast and speechless at the prospect. The agitators were only noisy and helpless. Here again we have John Marshall, always by instinct constructive, combating the agitators and red republicans, and out of the confusion of political tongues seeking to erect an orderly government. With the new government which at length rose from the confusion came another struggle — greatest of all — to define the relative powers, under the Constitution, of the Federal Government and the States, a struggle which lasted more than three-quarters of a century, and only had its ending when, after a carnival of blood compared with which the Revolutionary War was as nothing, the victorious sword of Grant was at length sheathed at Appomatox.

High above the clamor of this stupendous controversy stands John Marshall, like another Moses upon another Sinai, expounding — nay making anew — the Constitution, for Mr. Bryce in his American Commonwealth has well said that the Constitution is now "a far more complete and finished instrument than when it came fire-new from the hands of the convention. It is not merely their work, but the work of the judges, and most of all of one man — the great Chief Justice Marshall."

Marshall found between the lines of the Constitution

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the "implied powers," without which the central government could not effectively have acted or the Union long have endured. The Constitution was necessarily couched in general terms; Marshall supplied the details. He made of us a nation by construction. It has been well said that he found the Constitution paper and he made it power. His view was not only the view of a judge, but of a statesman, and in his day only a statesman was fit to act a leading part upon the Supreme Bench. Precedents were then few in any field of the law, and, so far as concerned the great questions of constitutional construction with which Marshall dealt, there were no precedents whatever. The government was new and comparatively untried. Its powers were organized and its functions assigned in a manner without any historic parallel. I am aware the members of the Convention of 1787, as of the ratifying conventions, were pleased, after the somewhat pedantic custom of the time, to talk much of the "British model," the Amphictyonic Council and the Hanseatic League, but the new government was like no other in those essentials out of which the great work of Marshall rose.

One original feature of our government was its confederate form, and this confederation of many local governments, having local, domestic jurisdiction, under one great head endowed with national powers for national purposes, was precisely the feature which fitted our system for the government of a vast territory like that of the United States. Had local jealousies permitted the destruction, or even a very great restriction, of the powers of the States in a single, compact government without flexibility or power of adaptation to circumstances, the strain of distant conflicting interests would probably

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have rent the central authority asunder, while it is certain if local views and interests had become completely dominant, as they came so near being both in our early and in our later history, we should now be two or more nations instead of one. Our nationality was saved by avoiding the extremes, but in the period of adjustment the blows of myriad conflicting opinions fell hard upon the national fabric, and nowhere harder than upon the Supreme Court. When a tribunal which carries no sword but reason assumes, in the exercise of a violently contested jurisdiction, to lay down the law to old and proud States and to departments of government confessedly co-ordinate with itself, violent protest, and even rebellion, is not unnatural.

Another distinctive feature of our then new government was its co-ordination into three independent departments,— legislative, executive and judicial,— with a written constitution defining the jurisdiction and powers of each. This was not copied from England, for no such thing is found in her polity. In England the cabinet has long been only a committee of Parliament, and the King is relegated to the high function of having birthdays, and indulging in the shows of mediæval pageantry. Englishmen talk finely of the British Constitution, but, to us in America, their Constitution is largely a delusion, because it is just what Parliament, at any time or on any occasion, chooses to make it, for Parliament is politically omnipotent. England at the time of our Revolution was a despotism with a Parliament at its head — rightly termed a despotism, because it was, in that day, wholly unresponsive to the will of the English people. By means of vast extensions of the suffrage, the sway of Parliament has now become more broad-based than in the days of

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our Revolution. A fine speech was that of Lord Chatham when, speaking of the poor man's cottage, he said: "It may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement." All this was true, but the *Parliament* of England could enter the poor man's tenement, though the King could not. Its power was arbitrary. The wholesome American theory is that unbridled power shall reside in no department of government. A distinctive feature of the American Constitution was that, as construed and administered through the Federal judiciary, it extended the protection of personal rights not only as against the executive department of the government, but as against the people's own representatives in the legislature. It defined popular rights, and guaranteed them against all powers of government, and this was its distinct advance upon what is called the British Constitution.

But in a government of departments thus co-ordinated, it was evident a tribunal must exist somewhere with jurisdiction to construe the fundamental law and define the powers of the several departments, as well as to mark the dividing line between the State and Federal authority. Without this, there would have been a jargon of conflicting interpretations. The demonstrations of history were bloody and conclusive that the executive which held the sword could not be left to define its own powers. Again, if the legislative branch could finally have decided for itself what acts it might constitutionally pass, then that department would have had unlimited power by simply assuming to exercise it, and, thus armed, it

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would have usurped the whole authority and have become a law unto itself.

Now, the framers of the Federal Constitution were exceeding wise men, and the wiser part of them did not express in that instrument in plain terms all they probably would have expressed had not the clamors of that time run so high and mad against "consolidation." The truly great statesmen of that convention compromised again and again in order to get any Constitution at all, and they were confronted with the necessity of putting in nothing that might further alarm an already jealous people who were expected to ratify their work. It is not wonderful, therefore, that the Constitution as it came from their hands nowhere said in plain words that the Supreme Court should be the final arbiter in all disputes of a Federal nature; that it should decide what powers were granted to the Union by the Constitution, what powers were reserved to the States, and what powers were either expressly or impliedly prohibited to the States; that it could define the limits of executive and legislative power under the Federal Government, and should be the ultimate and sole judge of its own jurisdiction. All these things the framers left where John Marshall found them — "between the lines." With such an unvarnished statement as that in the Constitution the people might have rejected it, and such men as Samuel Adams, George Clinton, and even Thomas Jefferson, would have been frightened out of their wits at the bare thought of giving the Federal Supreme Court so much power. It must be remembered that Mr. Jefferson, though eight years President, died at a green old age still vehemently denying any such jurisdiction or power in the Supreme Court, and he never forgave the pitiless logic by

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which John Marshall overwhelmingly established its existence.[1]

One of the framers of the Constitution, Gouverneur Morris, at the conclusion of the great work, said that the success of the new government would depend entirely on

[1] Proof of a total want of appreciation of the judicial labors of John Marshall is abundantly supplied in the writings of Mr. Jefferson. On May 25, 1810, he wrote President Madison, concerning a vacancy to be filled on the Supreme Bench: "The State has suffered long enough from the want of any counterpoint to the rancorous hatred Judge Marshall bears to the government of his country, and from the cunning and sophistry within which he is able to enshroud himself. It will be difficult to find a character of firmness enough to preserve his independence on the same bench with Marshall. . . . His twistification in the case of Marbury, in that of Burr, and the late Yazoo case, shows how dexterously he can reconcile law to his personal biases." Jefferson's candidate for the vacancy on the bench was John Tyler. On May 26, 1810, he wrote to Tyler: "We have long enough suffered under the base prostitution of law to party passions in one judge and the imbecility of another. In the hands of one the law is nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice. Nor can any milk-and-water associate maintain his own independence," etc. When Cushing, one of Marshall's associates on the bench, died, Jefferson wrote in great glee to Albert Gallatin (September 27, 1810): "I observe old Cushing is dead. At length, then, we have a chance of getting a Republican majority in the supreme judiciary. . . . The event is a fortunate one, and so timed as to be a God-send to me." A little later (October 15, 1810) he wrote Madison: "Another circumstance of congratulation is the death of Cushing." On December 25, 1820,—eleven years after Mr. Jefferson left the Presidency,—he wrote Thomas Ritchie: "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our Constitution from a co-ordination of a general and special government to a general and supreme one alone. . . . An opinion is huddled up in conclave,—perhaps by a majority of one,—delivered as if unanimous, and with the silent acquiescence of lazy and timid associates, by a crafty Chief Judge,

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the way in which the Constitution might be construed. This was a shrewd forecast, for, indeed, everything depended upon construction, and the contest, three-quarters of a century long, as to what the Constitution meant, was already under way before George Washington was inaugurated. In the confusion many contradictory propositions were asserted. Among other things it was said Congress was to judge of the extent of its own legislative powers; it was said a State, through its legislature, could interpose to stop whatever it deemed a usurpation on the part of the General Government; it was said the Supreme Court of a State was the final arbiter within its limits of all questions, State and Federal; and, finally, General Jackson made a charge upon the question with all the energy and dash which overthrew Pakenham, and declared he proposed to enforce the Constitution as he understood it himself!

Marshall has himself described in his Life of Washington the state of opinion in the early years of the Republic. "The country," he says, "was divided into two great political parties,— the one of which contemplated Amer-

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who sophisticates the law to his mind by the turn of his own reasoning." So long as Mr. Jefferson remained able to hold a pen he continued in his private letters to asperse the Supreme Court, and particularly Marshall. Part of this "sweltered venom" came to light soon after Jefferson's death in an edition of his writings edited by his grandson. When Marshall came to revise the Life of Washington, in 1831, he paid attention, in a note at the end of the last volume, to one of the attacks of his distinguished enemy. This note is as conclusive as one of Marshall's opinions upon the Constitution. It closes with these words: "This unpleasant subject is dismissed. If the grave be a sanctuary entitled to respect, many of the intelligent and estimable friends of Mr. Jefferson may perhaps regret that he neither respected it himself nor recollected that it is a sanctuary from which poisoned arrows ought never to be shot at the dead or the living."

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ica as a nation, and labored incessantly to invest the Federal head with powers competent to the preservation of the Union; the other attached itself to the State governments, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members." Among the men who thus incessantly labored to invest the Federal head with competent powers, Marshall himself was one of the greatest.

The controversy necessarily took on a political aspect. It was not in courts and among lawyers alone that the wrangling was done. The same local jealousies which denied the jurisdiction of the Supreme Court, as established in Marshall's decisions, had a little earlier denied, with menacing clamors, that the executive department, under Washington, had constitutional power to negotiate Jay's treaty of commerce with England, or to issue a proclamation of neutrality in the war between England and France. All the great measures of Washington's administrations had been violently denounced by the same persons who, later, assailed Marshall's interpretations of the Constitution. Indeed, it had been but a short time since, in the Virginia legislature, resolutions which Marshall himself had introduced as a member, expressing confidence in the "virtue, patriotism and wisdom" of Washington himself, came near being mutilated, after heated debate, on a motion to amend by striking out the word "wisdom." It seems past belief that the greatest Virginian that ever lived should have been accorded "wisdom" by a legislature of his native State by a slender majority of two or three. But such was the party spirit of that time, and I mention the fact here solely to show how bitter that spirit was.

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The great constitutional questions of Marshall's day may be stated in general terms, thus:

Is the Federal Government the final judge of the extent of its own powers under the Constitution?

Is the Supreme Court bound to take the law of its decisions as Congress or the President, or some State authority may prescribe it, or is it an independent tribunal, endowed with full power finally and authoritatively to construe the Constitution, and to judge of the limits and extent of its own jurisdiction?

Is the Federal Government a sovereign nation, established by and acting upon the people, or is it a mere compact,— a treaty among sovereign States,— whereof no common and final judge is provided?

And subsidiary in logic, perhaps, to these, though yet greater in consequences, was that other momentous question: Is the Federal union perpetual, or may it be at any time dissolved by the action of one or more of its members?

It was certainly desirable that the Union should be found to be indissoluble at the same time that the States were preserved as indestructible. But if any of the theories of constitutional construction which were rife at the opening of the nineteenth century had prevailed, except that maintained by Marshall and those who labored with him, then national sovereignty would have become an empty name, and the people would have awakened to the fact that they had not formed, as they vainly declared in their Constitution, "a more perfect Union."

To the solution of these great questions, sounding in political considerations of the highest import, fraught with the deepest significance to all future generations of Americans, John Marshall brought all the resources of

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a great, original mind; he brought a legal learning so far removed from pedantry that it has even been disputed that he was learned at all; he brought a logical faculty so keen and searching that cavilers were silenced and answer was impossible; he brought a personal character as pure as the ermine he wore; and he brought the calm, clear vision of one of the first statesmen of the age. In solving these questions he lifted the Federal judiciary into a position of responsibility and independence, and made it what it was meant to be: the guardian of the Constitution and the shield and defense of personal liberty for the American people.

It is not possible in a discourse like this to enter into details upon the great constitutional opinions delivered by Marshall, and yet a bare and bald statement of the points decided by him would now, after the mists of controversy have cleared away, seem commonplace, and would convey no adequate idea of the great work he performed. The ultimate propositions which his great decisions, as a whole, sustain may be thus epitomized: That the United States is not a mere compact, but a sovereign nation; that, within the scope of the powers delegated to it, its government is supreme; that it was instituted directly by the people and acts directly upon and for the people; that States and State agencies are powerless to obstruct its operations, mar its integrity or terminate its existence; that its Constitution, and the laws and treaties in pursuance thereof, are the supreme law of the land, and that in all cases of conflicting opinions as to the meaning of the Constitution, the Supreme Court has the right and power ultimately and authoritatively to construe it.

Whatever was incompatible with these fundamental

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principles in State laws or State decisions, or in the action of officials, either National or State, met his swift and sure judicial condemnation, and it will surprise one who studies the history of that time to see by how many different ingenious methods it was sought to impair the integrity of the Union. The sappers and miners were constantly at work beneath its foundations. Even ill-judging friends stabbed and wounded it in the darkness of ignorance. Marshall's was the great mind which had surveyed and fixed completely the boundaries of national power. He seems to have known precisely what remote redoubts and defenses must be held in order to maintain the citadel of national power, and he held them. He stood like an armed warrior, alert and invincible, upon the frontiers of the national domain, and in the forum of logic and law and sound reason he protected the Union against its enemies as absolutely as Lincoln and Grant afterwards defended it against the assaults of armed rebellion.

In Marbury *v.* Madison, 1 Cranch, 137, Marshall pronounced an act of Congress void as being in conflict with the Constitution, and in doing so established the jurisdiction of the Supreme Court as the final interpreter of the Constitution. This seems like a truism now, but in that day it aroused the most strenuous opposition, and the decision produced the most far-reaching consequences.

In the case of the United States *v.* Judge Peters, 5 Cranch, 115, Marshall granted peremptory mandamus to compel a United States district judge to enforce obedience to a judgment of his court. Judge Peters pleaded to the rule to show cause, an act of the Pennsylvania legislature protecting the defendants against Federal process, and said he "was unwilling to embroil the United States with Pennsylvania." Marshall held that the legislature

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of a State could not annul judgments or determine the jurisdiction of the courts of the United States, and that the Constitution and laws of the United States were the supreme law of the land.

In Fletcher *v.* Peck, 6 Cranch, 87, Marshall held a State statute void as being in conflict with the Constitution, and this decision was followed in Marshall's time in twenty-six subsequent cases. Since his time the cases on the same point are innumerable.

In Martin *v.* Hunter's Lessee, 1 Wheaton, 304, he held the appellate power of the United States extends to cases pending in the State courts, and that the Federal statute which authorized such appellate jurisdiction was constitutional.

In the great case of Dartmouth College *v.* Woodward, 4 Wheaton, 518, Marshall applied the clause of the Constitution prohibiting the passage of laws impairing the obligation of contracts. The doctrines of this noted case have been somewhat modified by subsequent judgments of the court, but the main doctrine announced is still followed.

In M'Culloch *v.* State of Maryland, 4 Wheaton, 316, he held that Congress had power to charter the Bank of the United States, and in the opinion he most lucidly and ably discusses the implied powers of the Federal Government. He also held in this same case that the State of Maryland was prohibited from taxing a branch of the Bank of the United States located in Maryland, the same being an instrumentality of the Federal Government and as such exempt from State interference. This is a great opinion, which one who would understand the Constitution must read.

In Cohens *v.* State of Virginia, 6 Wheaton, 264, he de-

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cided the Supreme Court could exercise jurisdiction in a case where a State is a party and a citizen of such State is the other party in a case arising under the Constitution and laws of the United States, and for that purpose could revise a judgment of the highest court of a State.

In Gibbons *v.* Ogden, 9 Wheaton, 1, he asserted the great constitutional doctrine of the power of the General Government to regulate commerce, and held that the word "commerce" in the Constitution comprehends navigation. He here denied the right of the State of New York to grant exclusive privileges to individuals for the running of steamers between a port of New York and a port of New Jersey, and incidentally denied in a conclusive manner the claim that the powers of the Federal Government should be "strictly" construed.

In Osborn *v.* Bank of the United States, 9 Wheaton, 733, he held Congress might give the United States Circuit Courts original jurisdiction in any case to which the appellate jurisdiction extends, and also that a law of the State of Ohio laying a tax on the Bank of the United States was void.

In Brown *v.* State of Maryland, 12 Wheaton, 419, he denied the power of a State to require an importer of goods to take out a license in the State in order to enable him to sell them, the fee required for such license being, in substance and effect, a duty upon imports, and therefore prohibited to the States.

In Weston *v.* City of Charleston, 2 Peters, 449, he held that a State tax on the stocks or bonds of the government of the United States, being a tax on the power of the Federal Government to borrow money on the credit of the United States, was repugnant to the Constitution, and void.

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In Craig *v.* State of Missouri, 4 Peters, 411, he held void a device of the State of Missouri designed for emitting "bills of credit" under the name of "certificates of stock." "Is the proposition to be maintained," asked Marshall, "that an act big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name?"

Such are a few of Marshall's great judgments, but the heated agitation of the time, the violent opposition, and even open rebellion, which the work of the court aroused, cannot be put into cold and formal propositions or stated in a syllabus. For instance, in the case before mentioned of Martin *v.* Hunter's Lessee, a mandate had issued from the United States Supreme Court requiring the Court of Appeals of Virginia to carry a judgment of the Federal court into effect. Virginia was Marshall's native State, where he was personally much beloved, but its highest court took a rebellious tone at being thus ordered to carry out a mandate of the Federal court. "The court is unanimously of opinion," gravely wrote the Virginia court, "that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the Constitution of the United States; that so much of the twenty-fifth section of the act of Congress to establish judicial courts of the United States as extends the appellate jurisdiction of the Supreme Court to this court is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court, and that obedience to its mandate be declined by

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the court." Martin then took a further writ of error to review this later defiant judgment, and the Supreme Court then reviewed the whole law of Federal jurisdiction in appeals from and writs of error to State courts in an opinion as clear and unanswerable as was perhaps ever rendered by any court. The opinion was handed down by Story, but no one who reads it, and who knows the terse and simple style and the cogent logic of John Marshall, will ever doubt that Marshall wrote every sentence of the opinion. Henry Adams says in his history that it was a great triumph of Marshall to thus induce Story, who had been appointed by Madison as a Republican, to render this conclusive and far-reaching opinion confirmatory of Federal jurisdiction.

Again, in a certain case wherein a statute of Georgia was held void as conflicting with the Constitution, that State openly rebelled and refused to carry out Marshall's decision, and General Jackson, then President, said: "John Marshall has made his decision; now let him execute it!"

Again, in Osborn *v.* Bank of the United States, which denied the power of Ohio to lay a tax upon the bank, which was an agency of the General Government and chartered by it, that State, in high dudgeon, declared its adherence to the State rights resolutions of Virginia and Kentucky of 1798 and 1799, and the Senate of the State of Georgia joined Ohio in the cry, declaring the presence of the United States bank upon Georgia soil without the consent of the State was a usurpation of the sovereign power of the State, and bumptiously inquired what use were written constitutions, "if by latitude of construction they were made to embrace every power convenient for the party in control?" They might have gone fur-

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ther and asked what use to have a Federal Constitution at all if each State of the Union, by its own narrow and final construction of that instrument, might virtually annihilate the government it established.

Kentucky's Governor, a little later, grew lugubrious, and declared in a message to the legislature that the sovereignty of Kentucky was so impaired by a decision of the Supreme Court that Kentuckians could "no longer be said to be a free people."

Several States, including Virginia, joined in an ineffectual effort to secure a separate tribunal other than the Supreme Court, with jurisdiction to try all cases involving conflicts of State and Federal authority. It would have been interesting, had this effort succeeded, to note how the blade of Marshall's keen and merciless logic would have trimmed away the pretended jurisdiction of such a bastard court, provided it had been erected otherwise than by a constitutional amendment. "Not a year went by," says Mr. McMaster, "but one or more States bade defiance to the Federal Government;" and when we add that the popular clamors which accompanied all these formal declarations were loud and bitter, my statement that Marshall was a hero, and that his work required high moral courage, is fully justified. No man can win fadeless laurels by simply going with the tide. If a strong current had been running Mr. Leander's way, and he had been well provided with life-preservers, he might have floated over the Hellespont every evening for twenty years, to gaze into the witching eyes of Hero, and yet never have been known to poetry or fame.

But somebody may ask, was Marshall always on the side of power and consolidation? Did he care more for a strong Federal power than he did for individual lib-

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erty? By no means. He meant his decisions should be as strong as the Constitution, no stronger; as weak as the Constitution, no weaker. He was as swift to vindicate the lawful authority of a State as he was that of the Nation, and the civil rights of the individual were always the subject of his zealous protection. In Bank of Hamilton *v.* Dudley's Lessees, 2 Peters, 492, he held that State courts have exclusive power to construe the constitutions and legislative acts of their respective States. "The judicial department of every government," he wrote, "is the rightful expositor of its laws, and, emphatically, of its supreme law." In Little *v.* Barreme, 2 Cranch, 170, he held the commander of a warship answerable in damages to a person injured, though he acted under instructions from the President, saying: "Instructions not warranted by law cannot legalize a trespass."

Soon after Marshall came to the bench he was called upon to preside in the Federal Circuit Court at Richmond in the famous trial of Aaron Burr for treason. Here, again, was illustrated his zeal in protecting personal rights. It was probably the most notable trial at *nisi prius* which, in the life of the nation, any Federal judge has been called upon to conduct. In the English law of treason, as it had been administered up to that time, the principal rule really acted upon had been that enough heads must be cut off to glut the vengeance of the Crown. The Federal administration was fiercely desirous of Burr's conviction and execution. The mob clamored for his blood. The prisoner was a profligate, insinuating and highly dangerous villain, who was then practically without friends and whose hands were red with the blood of Marshall's friend, Alexander Hamilton, the late leader of the Federalist party. Burr had himself defined law to

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be "whatever is boldly asserted and plausibly maintained." Should Marshall try this friendless prisoner by his own rule and receive popular applause over his speedy execution, or should he, as was his wont, impartially enforce the law and submit to censure? It would have been easy, under such circumstances, to begin the administration of the Federal law of treason in the new world by establishing a precedent dangerous to personal liberty. But Marshall read in the Constitution that "treason against the United States shall consist only in levying war against them or adhering to their enemies, giving them aid and comfort." He further read that no one should be convicted of the crime of treason except upon proof of an "overt act," which act was to be established by the testimony of at least two witnesses. In what did "levying war" against the United States consist? What should be deemed an "overt act"? Here were elastic terms, had the court sought a pretext for conviction. No such case as the Constitution contemplated was, however, made out against Burr, and Marshall practically so instructed the jury, which acquitted the prisoner. "No man," said he, in summing up the case, "is desirous of becoming the peculiar subject of calumny. No man, might he let the cup pass from him without reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

Men were not to be hounded to the gallows for treason, in the new world, upon mere suspicion. To "imagine the death of the King," or merely to *plan* the subversion of the Government, was never, through loose jugglery with

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the words of the Constitution, to be punishable as treason upon American soil. There were to be no "Bloody Assizes" beneath the glorious banner of the free, and *lese majeste* was henceforth to be the protection of despots and tyrants, who alone can require it. And who knows how great may have been the influence of this example in producing that most splendid spectacle in all history, when, after a rebellion the most gigantic of the ages, waged by men who sought to trample down by force the decisions of John Marshall, had been suppressed by arms, Justice, acting in the spirit of the great precedent set by Marshall himself, closed forever her book of retribution, and "stained not peace with a scar!"

The private interests involved in the cases decided by Marshall were as nothing compared with the public interests which the opinions guarded. "The judgments of Marshall," said Mr. Phelps, "carried the court through the experimental period and settled the question of its supremacy. Time has demonstrated their wisdom. . . . All the subsequent labors of that high tribunal on the subject of constitutional law have been founded on and have at least professed and attempted to follow them. There they remain. They will forever remain. They will stand as long as the Constitution stands; and if that should perish, they would still remain to display to the world the principles upon which it rose and by the disregard of which it fell." Another wrote: "The fame of the Chief Justice has justified the wisdom of the Constitution, and *reconciled the jealousy of freedom to the independence of the judiciary*," — a splendid statement, fit to be engraven on Marshall's tomb. Story said of Marshall's work in the court: "His master mind has presided in their deliberations, and given to the results a cogency of

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reasoning, a depth of remark, a persuasiveness of argument, a clearness and elaboration of illustration and an elevation and comprehensiveness of conclusion to which none others offer a parallel."

Any staunch Federalist who was a good lawyer might perhaps have entered the same court orders upon the docket that were put there by Marshall; but who could have defended the conclusions of the court as Marshall did? His literary style was simple, compact and clear. His taste and aptness in illustration were faultless. He never sacrificed conclusiveness to brevity, nor sense to ornament; and yet, though he never strove for mere effects, his opinions, in their completeness, in their masterly anticipation of all cavils and objections, and in their overwhelming conclusiveness of argument, will appear to any one reading them with a due sense of the issues involved, as truly eloquent and as moving as the great speeches of Webster and Clay.

The judicial children of Marshall's brain went forth doubly armored for defense, and so equipped and hedged about as to be invincible against assault. They "did their own talking," and are still vocal with the power of nationality. Political agitators might carp at them, but to answer them was impossible. The questions discussed concerned the very foundations of the government. In viewing a subject Marshall always took his stand upon an eminence, from which he could see the whole field of controversy. He seized at once upon that which was vital and left mere incidents for subordinate treatment. He was always calm. He knew how to be impartial without being colorless. He could not be jostled from his intellectual moorings by clamor or swayed from his high judicial course by passion. He knew his interpretations

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of the Constitution would be hotly contested and vehemently criticised, and so, about each one of his great judgments he set cherubim and a flaming sword, which turned every way to keep the way of the tree of national life.

With singular want of perception, Wirt once wrote that Marshall was "without fancy or imagination." He certainly had more taste than to deform grave legal discussions with tawdry rhetorical ornaments. There is a far higher and more refined power of imagination than that which daubs all subjects with gaudy and vulgar colors. It seems to me absurd to say that Marshall was devoid of imagination. All powerful minds have been endowed with imagination and generally with humor. Not every man who feels the thrill of fancy and sails the mystic seas with the Corsair has been caught "sighing like a furnace, with a woeful ballad made to his mistress' eyebrows." Commonplace men love to cling to the solacing belief that a mind through which the moths of fancy and the spirits of wit and humor corruscate is necessarily deficient in the more solid faculties of reason and judgment; but, in my opinion, the most effective man is he who possesses an imaginative and passionate nature, held under the control of reason. The man who has no fire in his soul may reason correctly, but even when most correct and precise it will be found he has moved no one. It is the moving element,—the contagion, so to speak,—which makes all writing and speaking effective, and, tried by this test, Marshall was certainly a master. The heart of a patriot swells with emotion when he reads these masterly vindications of the Constitution of his country.

Marshall's mind was immaculately pure, and his heart was full of the tenderest sentiments. "He was," says

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Story, "the most remarkable man I ever saw for the depth and tenderness of his feelings." He was, in short, a strong, true, tender, manly man, but plain and simple withal, and with great capacity for the enjoyment of innocent fun. On first seeing him Judge Story wrote his wife, "I love his laugh — it is too hearty for an intriguer,— and his good temper and unwearied patience are equally agreeable on the bench and in the study." Like the great Lincoln, Marshall was fond of droll stories, and had the reputation of relating them with success; and, I may add, that no two minds in American history have so many points and characteristics in common as those of John Marshall and Abraham Lincoln. The mind which at length vindicated the great opinions was cast in the mould of the one that conceived and wrote them. John Marshall and Abraham Lincoln! What jewels are these in the crown of fair Columbia!

Some one may ask, if the great questions of constitutional interpretation had at last to be fought out on the battlefield, of what use were the decisions of John Marshall? To this I answer, it made all the difference in the world which side was legally in the right in the great and final contest. Great is the power of ideas. "He is thrice armed who hath his quarrel just." It was infinitely important when the Southern States seceded whether they were merely exercising a constitutional right accorded them by the court of final interpretation, or whether they were launching out upon the wild sea of revolution. When Abraham Lincoln announced his purpose to enforce Federal authority in the Confederate States, and asked for men and means to carry out his purpose, it made all the difference in the world whether he was entering upon a war of preservation or a war of

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aggression and conquest; for, with a State rights construction of the Constitution upon the records of the Federal court of last resort, nothing is surer than that the Union would have been dissolved, and it would probably have been dissolved without even an effort to save it. Upon what possible pretext could the government have made war to preserve the Union, if its own highest court had solemnly decided that secession was an act warranted by the Constitution?

And so, not without reason,— not as an empty figure of speech,— I place John Marshall among the builders and saviors of our Republic. He was near eighty years old and still a member of the court when he died, and it is infinitely sad to know that his later years were haunted by the fear that his great work had all been done in vain. The party which denied his interpretations of the Constitution was everywhere in the ascendency. The Union seemed to him to be tottering, and the great buttresses of reason and logic by which he had encompassed the national power seemed to be giving way before the assaults of determined enemies. On July 31, 1833, he wrote his friend, Judge Story: "I fear no demonstration can restore us to common sense. The words 'State rights,' as expounded by the resolutions of 1798, and the report of 1799, construed by our legislature, have a charm against which all reasoning is vain. Those resolutions and that report constitute the creed of every politician who hopes to rise in Virginia, and to question them, or even to adopt the construction given them by their author, is deemed political sacrilege." A little later he again wrote Story: "To men who think as you and I do, the present is gloomy enough and the future presents no cheering prospect. . . . In the South, those who sup-

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port the Executive do not support the Government. . . . Many of them are the avowed advocates of the league, and those who do not go the whole length go a great part of the way. What can we hope for in such circumstances?"

But what must he have thought if he could have foreseen that in the year of grace 1860 an Attorney-General of the United States would give to his chief a labored written opinion advising him that the Federal Constitution gave to the National Government no power to preserve itself as against any State that might choose to secede from it; that any attempt to coerce such State into submission to the National Government would be making war upon a State without constitutional authority, and that such act of attempted coercion would be in itself a dissolution of the Union! And what must have been his anguish if he could have known that a President of the United States would deliberately put the substance of that opinion into a message to the Congress of the United States! But ah! had his vision penetrated a little further into the darkness of futurity, how it must have gladdened his great heart to have seen another man, modest and thoughtful like himself, coming out from the heart of the great people, "new birth of our new soil," with all the strength of a people's awakening in his knotted thews, with all their hopes and aspirations, all the will and fire of their patriotism radiant in his soul, laying his virile hands upon the broken cords of the rent and shattered Union; to have seen this new-risen giant, as he groped in the thick darkness and confusion of 1861, stretching back a confiding hand to him for support and inspiration, and through the roar and crash of final conflict making vital for all time those

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great ringing words of his own opinion in M'Culloch *v.* The State of Maryland: "The government of the Union is a government of the people. . . . It emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. . . . The government of the Union, though limited in its powers, is supreme within its sphere of action. . . . It is the government of all; its powers are delegated by all; it represents all and acts for all; . . . and its laws, when made in pursuance of the Constitution, form the supreme law of the land."

Around John Marshall's old home in the capital of the Southern Confederacy raged four years of relentless war, waged by his misguided countrymen to overthrow his great constitutional doctrines and with them the union of the States. But when at length the iron clutch of Grant upon the fated city compelled Jefferson Davis to flee in confusion from his capital with the belongings of his government, and Abraham Lincoln, modest and unattended, entered the city of Richmond on that April morning in 1865, the day of Marshall's historic triumph and vindication had arrived; and I have thought how fitting it would have been if the friends of the old flag had then and there gathered to express their deep thankfulness for a restored Union about his humble and neglected tomb! For whoever may have received the surrender of particular Confederate chieftains in the field, it is none the less true that, in accordance with the great historic unities, the Southern Confederacy, as the embodiment of political ideas, surrendered not to Grant, not to Sherman, not to Thomas or to Sheridan, but to the statesman, the jurist and the sage — John Marshall.

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Exercises at the University of Illinois.

Marshall Day was observed by the University of Illinois by an elaborate address, delivered by Andrew S. Draper, President of the University. In the course of his address President Draper said:

Address of President Andrew S. Draper.

Carlyle sums up the reasons for the failure of the Constitution of the Constituent Assembly of France in the title of one of his chapters with the words, "The Constitution will not march." Marshall gave the American Constitution the power to march. It has marched through all the difficulties which have encompassed it, and some of them have been great. It has not hampered freedom: it has moved on, and enlarged and extended it. It has marched upon firm ground: it has kept step to the heart-beats of a rapidly multiplying and a cosmopolitan people who have dedicated this fair land to freedom, and who know and at all times expect to make further use of their power.

The Constitution has not only marched upon unexpected roads in its original territory, but it has gone out and conquered much new territory. The greatest act, by all odds, of Jefferson's administration was the purchase of the Louisiana Territory from the First Napoleon. No student needs to be told of the bearing of that acquisition upon the destiny of the nation. The area of the original thirteen states was 909,050 square miles; that of the Louisiana Territory was 875,025 square miles. Jefferson looked into the Constitution very closely to find some specific authority for the proceeding, and was much troubled because he looked in vain. He was right, however, and his foresight and energy of action in the matter

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entitle him to the lasting gratitude of his countrymen. In 1819 the Constitution secured the Floridas, with 70,107 square miles, and in 1846 the Oregon country, with 288,689 square miles, by treaty. In 1845 we annexed Texas, and soon, by questionable means, coerced Mexico into a cession, and so obtained 949,808 square miles more. Alaska was taken by treaty in 1867, with 599,446 square miles. So the total of continental territory is quite four times what it was when the Constitution was adopted. The insular territory acquired in 1898 is computed by the Coast Survey at 138,399 square miles.

A facetious friend, learning the subject of this address, and referring to the decisions of the Supreme Court which are daily expected touching the status of the new islands which are on our hands, inquired if I thought the Constitution could *swim* as well as march. The Constitution has been swimming as well as marching all its life. Before it was out of swaddling clothes it could swim enough to put an end to the piracies of the Barbary States that had terrorized the nations of Europe upon the high seas for an hundred years. Before it was past the college age the Constitution swam well enough to call a halt upon the bad English habit of searching our merchant ships without leave. The Constitution swam very well indeed in the blockading squadrons, the cruisers, and the little Monitor in the war between the States; and it swam splendidly in the torpedo boats and the great battleships at Manila and Santiago. Yes, the Constitution has proved to a demonstration that it can swim as well as march.

It is true that we are confronted by some new and significant constitutional questions. Three years ago the nation started out in earnest to rescue Cuba from the

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atrocities of Spain. It was a noble, a sublime undertaking. It struck the high-water mark of democratic government for the good of mankind. It involved us in war with Spain. A notable and perhaps a decisive incident in that war was the destruction of the Spanish government, and the only government, in the Philippine Islands. Having overthrown a government we were bound to set up and maintain one. We have been trying to do so. The treaty of peace ceded the territory to us. We have accepted it and assumed responsibility for it in the great court of the nations. In attempting to enforce the authority which the usage and the common law of nations recognizes in such matters, we have encountered unexpected difficulties, and no one can tell just what is ahead of us. Numerous questions are raised, both as to the expediency and the legal right of our proceedings, and as to the constitutional status of the territory and the inhabitants involved therein. The legal questions have been argued in and are now awaiting the decisions of the Supreme Court. Some unusual anxiety has been raised by the somewhat fervid protests against both the advisability and the legality of the national proceedings by the two living ex-Presidents of the United States, both eminent lawyers and greatly respected men.

It will soon all be settled in our usual and peaceful way. Whatever our present thought we will accept the settlement, when it comes, with all cheerfulness. It is adventurous to anticipate the action of the Supreme Court, but I will adventure enough to express the surmise that the court will hold that there is a power in this nation to do whatever any other sovereign nation may do in the way of acquiring new territory and fixing the status thereof; that Congress and the Executive are charged

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with the exercise of this authority; that the propriety of its exercise in particular cases raises political questions with which the court has nothing to do; that when it is exercised by the constituted authorities, and through the usual forms, it must be sustained; that if the people are not satisfied with what is done they must elect a different Congress and a new President; and that there is no legal impediment in the fact that we have been upon unfamiliar roads and that the Constitution has been obliged to swim rather than walk in the performance of a meritorious, though unexpectedly difficult, national undertaking.

As to the expediency of what the nation is trying to do, may not this be said? Nations, no more than men, can look far into the future. They are not to hibernate because they cannot foresee. When occasion calls, they are to move forward. They are to take such initial steps as the mind and conscience of the people impel. When the thought and the feeling of the nation are clearly manifest, as they were in the case of Cuba, men and women who are charged with the exercise of the national power and have red blood in their veins will act. They will not hesitate because difficulties may appear in the road. They will take each succeeding step in the light of the conditions which have followed the last one, and with the best intelligence they have. With nations, as with men, the sequel will take care of itself.

My judgment has approved of the first and of each succeeding step taken touching the islands, both in the Atlantic and in the Pacific seas. I think that a further step should have been taken some time ago, and that it is imperatively demanded now. It is a declaration, not by the President, not by military commanders, not by a

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commission, but *by Congress* that this nation desires nothing, and will do nothing, touching the Philippine Islands which is not deemed to be for the good and the freedom of the inhabitants thereof; that our purpose is to uplift them and not to exact tribute from them; that it is not the intent to rule such inhabitants, except so far as is required to establish order; that it is desired that they shall govern themselves in any way they like, consistent with popular liberty and the common security of persons and property; that a general election will be ordered, as soon as it is apparent that it can be held, to choose representatives of their own who will confer with Congress and agree upon the relations which those people shall sustain to our people, and their government to the government at Washington; and that, while we must assume the responsibility of conclusions so that we may protect our own good name before the world, yet we shall look with approval upon any plan which promises a stable government, headed towards constitutional liberty, among the Filipinoes, without so much care about the details thereof, or about the legal relations which that government may bear to ours. This step, in my judgment, is demanded because the unselfishness of our purposes is being called in question, because there is uncertainty which, it is said, is prolonging an armed conflict; because the great heart of the nation throbs truly; and because it is a part of our unwritten Constitution that this great Republic shall not pursue conquest for gain, but rather that whatever it does shall be done to extend knowledge and uplift free government in all the world.

The lesson of the work of the Great Chief Justice is as important a lesson as the world has had to learn. That work has secured, if it has not saved, the structure of

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democratic government. In a sentence, that lesson is that a free Constitution, written or unwritten, can and must be progressive.

The Constitution of the United States has not been written in completed form: it never will be. The Constitution itself has not been perfected: it never will be. The resources of language can describe the Constitution but inadequately. It is infinitely more than our fathers were able to agree upon, or to anticipate and formulate in a written paper a hundred years ago.

It is all that we inherited from the mother country after all the heroisms and triumphs in the evolution of a race, and in the building of a free nation through a thousand years. It is all that the millions from the other great nations have brought to us since our birth as an independent nation. It covers a full knowledge of the accomplishments and the failures of all other governments in all ages and in all the world.

It is the physical energy and the intellectual resourcefulness which have come from the admixture of blood and of civilizations.

It is the country we now possess, crossed by the natural thoroughfares of the nations, with endless shores and uncounted harbors washed by the waters of both oceans. It is our mountains and plains, our great lakes and majestic rivers, our diversified climate, our corn lands and cotton lands and wheat lands, our inexhaustible mines, and the herds upon our ten thousand hills.

It is our great factories in every town, our magnificent steel highways threading our valleys, tunneling or scaling our mountains and making the maps of our prairie States black with their frequency. It is our genius in invention and our skill and courage in engineering. It is

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our common respect for labor, and the accounts in our savings banks. It is the unparalleled opportunities, in every direction, which are offered to rectitude and to endeavor, no matter how humble the roof under which they were born. It is our publishing houses, our newspaper press, our libraries and museums and art galleries.

It is our improved house making, and the innumerable new conveniences which enter into our home making. It is more than that: it is the spirit of the American home, the equality of right in it, the exalted position of woman, and the dominating influence of the mother in the household.

It is our free public school at every door, and our centers of the higher learning pushing the scientific advance in every possible direction and promoting every conceivable phase of intellectual activity. It is our churches and our Sunday schools, the complete toleration of religious opinion, and the common respect for religious worship. It is our private benevolences, and our steadily improving treatment of the troublesome and dependent classes.

It is the individualism and the balanced sense of the nation, the love of freedom which is so strong that no one is afraid of losing the object of it. It is the regard for laws which are fundamental, the indifference to laws which are seen to be only advisory, the jealousy of laws which tend to favor special interests or seem to set at naught the common thought.

The old Pilgrim at Plymouth, the minute-man at Lexington Green and Concord Bridge, were in our Constitution at the beginning: the citizen soldier of the Civil War, the Oregon upon her fifteen thousand miles journey around the Horn and then at once the decisive factor in

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the most sanguinary naval battle in all history, the college boys and farmers' lads and millionaires' sons fighting their way together up the flame-swept hill at San Juan, the veterans of the Ninth Regular Infantry pushing their way through the August heat and the sand and filth of China and battering down the gates of the Forbidden City to relieve the American legation from the horrors of Peking, are all in the Constitution *now*.

The spirit of the nation, that spirit which moved out of the old world into the new, that chastened and tolerant, that sober and yet aggressive spirit which separated from an established church, and so learned how to separate from an autocratic state; which centered at Plymouth Rock, and then tempered the heroic but intolerant sentiment at the Bay; which moved out into the valley of the Connecticut, and then crossed the Berkshires into the valleys of the Hudson and the Mohawk and the Susquehanna; which crossed the Alleghanies and the Blue Ridge; which took possession of the prairies with confident and resolute step; which scaled the Rockies and claimed the Pacific shores; which passed through the Golden Gate and into the beyond. This spirit is the very life of the Constitution. The spirit that has fattened for a hundred years upon what it has fed, that chafes more and more at the long continued exactions of the kings, and that would extend free government, its helps and its opportunities, is in the Constitution in yet larger measure now than in the days of our fathers.

More, far more, than any one can tell is in the American Constitution. May the God of nations give us larger reverence for the inspirations that are in our history, whether inscribed in the law books of state, or written upon the hearts of men and women. May the written

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law be construed in the light of the traditions, the heroisms, the opportunities, and the aspirations of the unwritten. May the Supreme Court never lack in discretion, or in courage. And under its guidance may the Constitution march on. May it advance without greed, and, if possible, without war. May it go forward with the consciousness of moral right to widen the area of civilization and enlarge the liberty of the human race. Never fear. Vastness may prove to be the ark of our safety. May all the fundamental principles of human liberty be upheld and, within the lines which they have laid down, may the Constitution and the flag of the great Republic MARCH ON.

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STATE OF WISCONSIN.

In Wisconsin Marshall Day was observed by proceedings under the auspices of the Milwaukee Bar Association in Plymouth Church, in the City of Milwaukee, and by a banquet held at the Plankinton House in the evening. A large assemblage of lawyers and citizens attended the celebration in Plymouth Church. F. C. Winkler, President of the Bar Association of Milwaukee, introduced as the orator of the day Neal Brown of Wausau, whose address, omitting biographical details and other matters already given in preceding addresses, is as follows:

Address of Neal Brown.

The art of biography has never been able to spoil the fame of John Marshall, and the multitude of biographers have never cheapened or vulgarized any act of his. Whether in school-boy garb poring over Milton and Shakespeare, or as a soldier of the infant colonies at Brandywine, or in the blood-stained snows of Valley Forge, or serving their councils when peace came, or as the master-mind of our great tribunal for many years, he was every inch a man. It is not given to any other profession in this country to have one universally accorded, pre-eminent name. We could not agree on the greatest soldier, poet, philosopher, novelist, or the greatest statesman or preacher; but I think we would all name Marshall as our greatest jurist.

But it is a fine quality in the character of Marshall that whether we come to him early or late, he always has

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for us the same unchanging manhood and serenity, the same moral elevation.

The bar did much for Marshall. Before him came the great lawyers of his day. There came Martin and Harper, Ingersoll and Dexter, and the lawyer-poet Key; there came from the west the great Kentuckian, Henry Clay, and with him Marshall the younger; there also was the exiled Emmet, who fled from his native land after his brother gave up his life to English justice; to that court also came Rawle and Dallas, Binney and Sergeant, the eloquent Pinkney, Stockton, Wirt and Adams. Early in the century Webster appeared there, rugged and somber as his own New England mountains, a figure of heroic port, fit to hold a world in awe. Some of these lawyers of Marshall's court, like Swann and the Lees, who argued scores of causes before him, had not fame enough to accord them a place in the cyclopædias,— those dusty crypts of the immortals. So often it is that the fame of the great lawyer is written in the running water; you may search and you shall find but his name, or a handful of dust, in I know not what forgotten graveyard. It was an age of saddle-bags and circuit-riding,— the golden age of the American Bar. Not golden in fat fees for the lawyer, but golden in its wealth of high ambitions and aspirations, in its leisure for study and reflection. The lawyer was not ruffled or discomposed by the roar and clang of a hurrying civilization. Calmly he could welcome the pale midnight lamp and the day of toil succeeding. The great lawyers who came to Marshall's court had the primal vigor of a new race. . . .

It is over the primal traits in Marshall's character that we may wish to linger longest, and not over the dry chronology of the encyclopædias,— those gigantic tumuli,

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wherein has been elaborately deposited the mere skeleton of history. Marshall's leading characteristics were those of true greatness,— simplicity and directness, with an entire absence of pretense or affectation. He never made it possible for any man to speak better of him than he deserved. . . .

On January 31, 1801, he was appointed Chief Justice of the Supreme Court, which position he held until his death, July 6, 1835. I will not dwell upon the full chronology of the honors that were bestowed upon him; they are known to every school-boy. Whether the place he filled was great or small in the estimation of men, he made it great by the strength of his personality.

There were strong rivalries among the public men of Marshall's day. He and Jefferson were never at harmony, although Jefferson was the more critical and censorious of the two. In his way he was as great as Marshall, yet with some minor weaknesses of character not apparent in Marshall. As the author of the Declaration of Independence, and in the part he played in the drama of the Revolution and in the reconstruction period following it, he was second only to the great Washington, in the estimation of the people. He was bold and daring in his views, and more far-sighted than any of his associates except Hamilton. He had the paradoxical personality of a democratic aristocrat. In social position he was a Virginia country gentleman, with every inducement to respect his class and uphold its privileges. Yet he was always in rebellion against this class, and manifested a passionate love of the people and of a pure democracy from which every trace of feudalism and patrician privilege should be eliminated. In Virginia, he proposed measures for the disestablishment of the church

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and for complete religious freedom, and abolishing the laws of entail and primogeniture. Himself a slaveholder, he hated slavery as an aristocratic institution, and he advocated a bill forbidding the importation of slaves into Virginia. When Congress was legislating for the Northwest Territory, he framed a clause interdicting slavery in this territory after the year 1800, in almost the exact language of our Thirteenth Amendment. His theories were almost diametrically opposed to those of his great rival Hamilton. The cleavage line between them became strongly marked when they were together in Washington's cabinet. From that time on party alignment was that of Federalist and Democrat; of States Rights and Centralized Government. Jefferson believed ardently in the people; Hamilton had a certain distrust of popular government, founded on the belief that it would never realize the anticipations of its advocates, and would of necessity have many defects and weaknesses. He believed in a strong National government, with power to enforce all measures for its well-being, even against the will of the States. Jefferson believed in States Rights, so called. Practically, he proved that he was ready to go far in opposition to his own theories. Jefferson and his following believed that the Hamiltonian view would lead to the destruction of the rights of the States. Washington seemed to occupy middle ground between these two opposing schools, with an inclination towards the Federalist side. As soon as peace came, he saw that the Confederation had no governmental power. He spoke of the contempt that would be felt for us abroad, when it was seen that the States were sovereigns or not as best suited their purposes; "in a word, that we were one Nation to-day, and thirteen to-morrow."

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Marshall held to this opinion, and no doubt much of his labor thereafter in construing the powers of the National Government was inspired by his experience and observation of this period of weakness and imbecility. The States were jealous of each other and jealous of any government they might jointly establish. Marshall was really a conservative Federalist, more of a Democrat than Washington, not so much of a Democrat as Jefferson. While Washington lived, Hamilton moulded the new government his way. Jefferson was the greater of the two in his ability to win and hold the people. He harmonized himself with them, and was always ready to go with them a little in order to induce them to go with him as far as he wished. He followed, in order that he might lead. Out of power he was a radical, the terror of those who believed in the established order; in power he was a careful and prudent conservative, acting in the main wisely and justly. He presents in this, not the only instance in history of the sobering influence of power and responsibility upon the radical, who before was a volcano of fierce and startling declamation. When he became President he speedily recovered from his fear of the dangers of a strong government. In some ways he seemed to have had a marvelous foresight. He sent the Lewis and Clark expedition to explore the territory northwest of the Louisiana purchase, in 1804, and thus laid the foundation for our claims to the country on the Columbia river. He saw at least some of the potentialities of the Louisiana purchase, and closed the bargain for it with the First Consul, hurriedly and secretly. This was an act of daring statesmanship that collided directly with the States Rights doctrine as to the limited powers of the Federal Government. It is doubtful whether

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Hamilton, in Jefferson's place, would have dared to go as far, for it was thought to be an exercise of power outside of the Constitution. Jefferson could so act, because he knew his own power with the people and that he could justify his course to them. As to this and other measures, long before his administration closed, we find Jefferson sitting in the seat of the Federalist and not afraid. It is said that he inspired the Kentucky and Virginia resolutions, which declared the extreme doctrine of States Rights, yet during his administration he was so busy building up the powers of government that he overlooked them. At the same time he was criticising Marshall severely for the Federalistic trend of his decisions. The discredit attached to the alien and sedition laws, and the success of Jefferson's administration, caused the slow disappearance of the Federalist party. Its existence was in a measure useless, for its work was being done by the Democratic party. But the ghostly Cassandra of States Rights would not down. It croaked balefully, first with one party and then with the other. Of all propagandas, it has been the most mercenary and changeable. Now it turns up in New England, now in Pennsylvania, now in South Carolina, and then again in highly virtuous Wisconsin. It presided at the birth of the Kentucky and Virginia resolutions; it was the leading spirit of the whisky rebellion in Pennsylvania; it shrieked with the New England Federalists in the days of the Hartford convention when Massachusetts was seriously contemplating seceding from the Union; it defied Jackson in South Carolina, and inspired the nullification of the fugitive slave law in Wisconsin. Democrat, Federalist, Republican, Whig,— the advocate of States Rights and the advocate of a strong National government, have al-

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ternated, and veered and shifted, and stolen each others' places, and have kept countenance through it all with marvelous effrontery. Sometimes this magniloquent phrase played comedy, sometimes tragedy. The last act of comedy that we need consider here, is Jackson issuing his proclamation against the nullifiers of South Carolina, and threatening to hang them if they persisted in their course, and being complimented therefor by all the old Federalists, who had thus seen the fullness of national salvation.

Disraeli said of the wars and hatreds of nations, "All is race." So in the world of politics, all is phrase. In the Kingdom of Fools, the phrase-monger is the chief potentate, and the world of politics being the main province of this kingdom, the fools who infest it aver that all wisdom and righteousness is vested in the twaddle of a phrase. Thus presidents are made and unmade by a shibboleth of empty words. States Rights was for long a strutting phrase, the pet of politicians, and the god of both fools and knaves for three-quarters of a century; yet always like a tale told by an idiot, "full of sound and fury, signifying — nothing." As a toy to charm the people it was reasonably harmless at first. Finally it became linked with the slave-power in hideous brotherhood of crime and shame, and they died together, leaving as mute witnesses to the power of a phrase, a million graves. These things are suggested in passing; they help to enflesh the dry bones of history, and to quicken them with life. Much of this history proves how rare and precious and how remote from mortal ken is the jewel of consistency; like the Holy Grail of Knight Errantry, that none might secure save the pure in heart.

Through the turbulent unrest of this early time, Mar-

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shall toiled, building and strengthening the edifice of Constitutional Law. We cannot look back to one of his decisions construing the powers of the States or of the National Government, and wish that it had been different. He was a son of Virginia, the slave-holding home of States Rights, yet his construction of the Constitution forged for us the mightiest weapons with which to free the slaves, and to smite into cureless ruin the doctrine that a State might dissolve the Union. He went upon the bench at a time when the right of the courts to nullify laws because of their unconstitutionality was but reluctantly conceded. He was not the pioneer of this view, although he became its most eminent champion. In 1786, in Rhode Island, the court held an act of the legislature void for this reason. For this the judges were impeached, but were not removed, although the legislature, refusing to re-elect them, put more pliant judges in their places. In 1803, in Ohio, a statute was held unconstitutional, and this led to the impeachment of the judges, but they were acquitted. In 1795, in Pennsylvania, in the United States court, a statute which attempted to divest one man of his property and give it to another was held unconstitutional. In 1798, in the same State, it was held that a law contrary to the first principles of the social compact was void as not being a rightful exercise of the legislative power. This broad principle has been sanctioned by the Wisconsin Supreme Court in Durkee *v.* Janesville, 28 Wisconsin, 464. Marbury *v.* Madison was the first case in which Marshall refers to this power in the judiciary as an established rule. Thereafter he supported it with all the ardor and strength of his great genius. It has been the priceless adjunct of free government, the mighty shield of the rights and liberties of the citizens. It has

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been many times invoked to save him from illegal punishment, to save his property from the greed of unscrupulous enemies, and to save his political rights from the unbridled license of victorious political opponents controlling legislative bodies. Nor does it now sleep, except as a sword, dedicated to a righteous cause, sleeps in its scabbard. We had never more need of it. The shop-keeper of petty instinct who desires to crush out business rivals or to keep non-resident competitors out of the State; the producer who seeks to make a market for his own wares by taxing a rival commodity out of existence; the suitor who tries his cause in the legislature in order that he may secure there that which the courts cannot in justice give him; and all unworthy covetors of their neighbor's lands or goods,—are now, as ever, shameless constituents of our social structure, calling for the constant vigilance of the courts in the protection of constitutional rights. Nor have we yet reached the perfection of constitutional government. We cannot attain it until we have cut down the Upas Tree of Privilege to the very roots and have torn the roots from out the soil. It is an alien growth, our legacy from the Dark Ages; hoary and venerable with years, sanctioned by custom and tradition, its worst excesses elevated by its worshipers into religious rites; watered and nurtured by the perennial greed and selfishness of man; outlasting all other change, and all other governmental tyranny, and escaping by unfortunate mischance to this day the Ithuriel spear of Freedom. We need additional constitutional guarantees that will give to every citizen the right to prevent by appropriate remedy legislative grants of gifts and bonuses out of public moneys to private business enterprises, and to prevent the gift of public franchises that are the property of the

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whole people. Until we have thus perfected free institutions, we may well feel the shame of the prophet, of whom it is said,— "And he went a day's journey into the wilderness, and sat himself down under a juniper tree; and he said,— Now O Lord, take away my life, for I am not better than my fathers."

This anniversary of honor will fix our attention anew on those fundamental principles upon which free and equal government must rest. The opinion of the bar will go far to secure such new guaranties of the rights of the citizen, and such new limitations on the power of those who band together to use government for their own selfish ends, as may be necessary.

Tyranny has ever a new face. It now gains by guile and stealth what it once seized brutally and with the strong hand. Every score of years we need a new Runnymede, where we may beard our captains of Privilege, and wrest from them a new charter of rights. I have no fear of the conventional anarchists. Free speech is the best cure for their activities, as it is the best safety valve for the escape and dissipation of all the humors in the body politic. But for the greater anarchists who sit enthroned in high places and purchase legislatures and municipal officers, and who are insidiously subverting our liberties, and filching from our pockets what is not theirs, we need all our vigilance. Freedom and equality have a deeper meaning than the frothy interpretations of our professional flag-wavers,— especially such of them as wave the old flag with one hand, and reach for the public treasury with the other. Unjust laws which unjustly and unequally distribute the wealth earned by the toil of our people are not a part of the inheritance received by us from the Fathers of the Republic. They

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are of the bastard, changeling brood of Oppression. Our real greatness lies not in the vast bulk of our swollen census reports, where we keep the toll of our aggregate wealth, for the debit side of the account will show that through legislation born of greed, a few have gained more than thrift and industry can rightfully give them.

> "Of what avail the plow or sail,
> If land or life or freedom fail?"

But recently new responsibilities have come to us that must be met wisely and justly. They call for the talent of the statesman, not of the politician. I do not assume to make a standard of conscience for others, but only to be a poor keeper of my own; yet from the beginning of the war in the Philippines I have been one of those of an opposite political faith to the President who have felt that it was our duty to uphold the administration in carrying on this war. For our country is nearer to us than our politics; its flag is ours, its battles and its honor are ours, no matter who may live in the White House, or who may hold prate and debate in our two houses of palaver. So we have felt that our armies must put down armed resistance to our authority at whatever cost in blood and treasure. As Americans we should stultify ourselves by allowing any political convention or any partisan considerations to swerve us from this course. When our fellow-citizens return from fighting our battles, they cannot shame us with the bitter reproach that we fired at them from the rear. Under the inspirations of our mighty theme, I have thought best to refer to some of the weighty problems that are pressing upon us,— the weightiest that we have met since the slave-power went down in battle thunder and flame. Whether

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it was wise to take our island possessions depends upon how wisely we execute our trust towards the simple and dependent peoples who have confided in our integrity. Shall we generously share with them our destiny, or shall we only allow them to come to our father's house as step-children and poor relations? Shall we keep them in the vestibule of the Temple of Liberty, while we gather close to the altar? We have placed our own fundamental rights in the Constitution, where no chance or change can destroy them; shall theirs be as highly placed, or shall they be cast out on the shifting current of our politics, to be the sport and mock of the time, mere bondmen of the fickle grace and favor of our changing political dynasties? If American manhood still remains clothed in its full nobility, it will assuredly not bestow the rights of freedom with miser care on these wards of our civilization. An ex-President in a near-by State, who has proved that an ex-President may be a statesman and not a mere oracle of commonplace, says of this matter: "It has been said that the flash of Dewey's guns in Manila Bay revealed to the American people a new mission. I like to think of them as revealing the same old mission that we read in the flash of Washington's guns at Yorktown. God forbid that the day should ever come, when, in the American mind, the thought of man as a 'consumer' shall submerge the old American thought of man as a creature of God, endowed with 'inalienable rights.'"

This observance will surely lead us to a greater respect for fundamental rights. Marshall watched beside constitutional government on this continent in its very cradle-time. It is not too much to say that, because of his fostering care, it has defied the mutations of Time, the

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struggles of a nation in arms, and all the storms of war and peace, until now in its mid-noon splendor it is an example to the whole earth. Those who fear for the perpetuity of American institutions, if they will read well our history need not be dismayed over the dangers that lurk along our pathway. The rocking pine that has stood before the whirlwind does not fall prostrate before the summer breeze. If the Union could grow out of the warring elements of the Colonial Confederation; if it could survive the evil days that followed its establishment, when its enemies were straining its untried strength; if it could acquire and absorb peacefully the vast territory west of the Mississippi; if it could endure through the hell of human slavery, and through the dreadful war that made our land one great charnel-house, and finally spring stronger and wiser from the shock and dismemberment of that war, it surely cannot come to wreck because of this or that policy of protection or free trade or finance, or because we may grasp, even though unwisely, new lands beyond our ocean boundaries. Having endured so much it surely can endure little. It has firmly withstood both foreign and domestic war and the machinations of bitter and powerful enemies both at home and abroad; it cannot be that any pigmy peril will shatter it. It has lived through the valley and the shadow of death; it stands now in the open, in unshadowed dignity and power, where every wind of heaven brings it favor. So I would say, let us not be afraid. For us who believe in and trust the American people, the trifling contentions of heated political campaigns light no danger signals that we can regard. These things are but for a day; our destiny lies with the centuries. We have always with us the great covenant of our faith, and through storm and confusion the wis-

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dom of John Marshall shines forth like the light-house beacon that guards the seas. Let it be our mission to see that no cunning hand shall undo his work, and that no pretense of expediency and no clamor of the opportunist shall be allowed to wring a paltering decision from our highest tribunal and thus loosen the bonds of our respect for it. The argument of policy and expediency never weighed with him; let us also be deaf to such ignoble considerations. For over thirty years he expounded with jealous fidelity the charter of our rights; let us expound it with like fidelity through our span of years. If we as lawyers shall refuse to take our convictions ready-made from party platforms; if we shall remain unmoved in the midst of party faction, holding fast to the unchanging verities that were so dear to him; if we shall refuse to yield servile approval to judicial decisions inspired by prejudice or popular clamor, or rendered at infamous political behest, or upon careless or insufficient consideration, but fearlessly maintain that independence which is the grandest tradition of the bar, then indeed shall we be worthy pupils of the great pioneer jurist whose life work is our priceless inheritance.

And now the grateful task which you have so kindly and generously given me is finished. The thronging inspirations of this work and of this hour will not soon depart from me. I feel still that moving awe and veneration which must accompany him who walks where heroes sleep. It has been a dear and valued privilege for me to add my portion to the great sum of eulogy which this day brings to the memory of John Marshall. His, was the rounded and perfect life, of more than Roman virtue and manhood; his, the reward richer than that bestowed upon great kings who sleep at Westminster. Divine

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Providence generously gave him a greater length of years than that usually allotted to man, that his work might be well done. Upon his grave at Richmond we place as great a tribute as affectionate remembrance ever paid to man.

"In toil he lived, in peace he died,
When life's full cycle was complete,
Put off his robes of power and pride
And laid them at his Master's feet."

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STATE OF IOWA.

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presided over by J. J. McCarthy, President of the State
Bar Association, the principal speaker being John N.
Baldwin; the other celebration was held in the
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prominent members of the State Bar on various phases
of Marshall's life and public services. Mr. McCarthy,
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Introductory Address of J. J. McCarthy.

We meet to observe the first centennial of the installation of John Marshall as Chief Justice of the United States Supreme Court.

[1] A complete account of the proceedings at Iowa City was published in the Bulletin of the State University of Iowa, Series No. 33, June, 1901, entitled as follows: "John Marshall. Addresses delivered at Iowa City, February the Fourth, at the Centennial of the Installation of John Marshall as Chief Justice under the Auspices of the State University of Iowa and the State Bar Association. Published by The University, Iowa City, Iowa, 1901."

RICHMOND HOME

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To Marshall constitutional liberty meant a union of States. He was the especial champion of the public faith and credit, and of the sacredness of the rights of private contract. He would palsy the hand raised to destroy either. Public justice, public virtue and public liberty were his maxims. In the struggling days of the Republic he nailed the flag of the Union to the Constitution. And he had the courage of his convictions.

It is indeed appropriate that the University and Bar of the great State of Iowa, unknown and unborn in Marshall's time, should unite to do honor to the memory of the eminent jurist, and aid in perpetuating the principles that have proved a blessing and protection in the past, and will continue to guide and help mankind as long as the science of jurisprudence shall be studied, or human liberty held sacred.

Here, at the old Capital City, now the seat of the leading educational institution of the State, in which we all take just pride, let us signalize in some measure our gratitude for the pure, lofty and imperishable contributions to the cause of free government, bequeathed from the pen of the giant genius whose memory we celebrate.

Address of John N. Baldwin.

John Marshall was installed as Chief Justice of the Supreme Court of the United States February 4, 1801. We meet to-day to commemorate the first centennial of that great event. Similar meetings are being held throughout these United States. It is fondly hoped by those who instituted these proceedings that they will be so impressive and interesting that hereafter the 4th day of February will be familiarly known as "John Marshall Day," and will be observed by those who are to come,

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with as much interest and enthusiasm and with as appropriate ceremonies as the "4th day of July" or "Washington's Birthday."

It was with commingled feelings of pride and diffidence that I accepted the invitation to perform a part in the observance of this day, and at this place of learning and instruction. To be called to make this address upon this occasion and with such a subject, in this presence, before the accomplished and the distinguished, and at my *alma mater*, is to me a transcendent mark of regard. To those who called and to you who attend, I humbly offer my deepest and most affectionate gratitude.

The greater part of the time which has been so generously allowed to me will be devoted to the consideration of the work and worth of Marshall as the constitutional judge, and I shall feel that I have performed well my part if my rude words shall awaken your interest and incite you to study his life, character and services, not only as a judge, but as a soldier, lawyer, statesman, diplomat, author, citizen and patriot. A careful study of his thoughts and labors from the day of his birth in Fauquier county, Virginia, September 24, 1755, to the day of his death at Philadelphia, July 6, 1835, creates the ineradicable impression that during all of this time, Duty must have guided him, Genius shone upon him, Angels watched over him, the Immortals loved him, and God received him.

He did not need a college to study or a university course to develop. One year's instruction with a clergyman, one year's instruction with a Scotchman, and two years under the fostering attention of a watchful, interested and affectionate father, constituted his whole scholastic training. That most comprehensive mass of

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learning, useful, solid and elegant, which fitted him to occupy the highest stations in life was acquired and nourished by the vigils of his own genius and his own untiring efforts. He mastered the classics by his own unassisted diligence, aided by a grammar and a dictionary. . . .

After his return from Paris he took up anew the work of his profession. Responding, however, to a personal appeal from Washington, he became a candidate for Congress, was elected, and took his seat in December, 1799. While he was yet a candidate, President Adams offered him the seat on the bench of the Supreme Court of the United States made vacant by the death of Justice Iredell; this he declined, and Bushrod Washington was appointed. In 1800 President Adams nominated Marshall to the War Department, but he declined the appointment. Thereafter upon the express solicitation of the President he accepted the position of Secretary of State. On January 31, 1801, President Adams nominated him Chief Justice of the Supreme Court of the United States.

John Marshall was Chief Justice of this Court for thirty-four years. In order to understand and thoroughly appreciate the services he rendered his country, and the ability with which he discharged the duties of his high office, we must know the character of the tribunal over which he presided, the time, the questions before it for consideration and determination, the possible effect of its decisions not only upon this people and their affairs, but also upon the world and its affairs.

It was the Supreme Court of the United States, one of the three co-ordinate branches of the government, and the grandest conception of the Constitution. It can an-

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nounce irreversible decrees. From its judgments there is no appeal. We do not find in the framing of any other society or form of government, of which there is any record, a court possessed of such dignity and powers. No tribunal, either in ancient or modern times, ever had conferred upon it such extensive powers and prerogatives. "No king, no magistrate, no parliament, no congress on certain great topics of judicial control and decision, can overrule or reverse the decrees of this tribunal. Nothing short of a new Constitution of the great nation that has grown up under this Constitution, by a change in its own sovereign decrees, could reverse these public judgments of this court. When errors have been committed in France or England in their great tribunals, their chambers of government, their parliaments, can change the law, but in this great class of the powers and duties of this tribunal, the power of the law-makers devolved by our Constitution upon the two Houses of Congress, in all its plenitude, cannot change the constitutional decrees promulgated 'by this court.'"

When first created and when first presided over by Marshall, the majestic proportions to which this structure would be carried were not in contemplation or foreseen.

On January 4, 1790, in the city of New York, this Court was organized and held its first session. Sessions were held in New York until 1801, and then — a striking coincidence and favorable omen — on the day of the first meeting of this Court at the city of Washington, as the seat of the National Government, February 4, 1801, John Marshall sat as Chief Justice for the first time. . . .

When he was appointed Chief Justice, American Constitutional Law was an unknown science. To create a national government by a written paper was a novelty,—

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perhaps a brilliant, but certainly a perilous, experiment. The people accepted it, but with doubt, fear and anxiety. It was adopted by a small majority. It was opposed by many of the people, and the representatives of this opposition were men of the highest character, the greatest ability, and the most brilliant attainments. They predicted its downfall and grimly foretold the evils that would follow its overthrow. The nature and extent of its powers gave rise to most animated discussions, in which reason was employed to demonstrate the mischief of the system and "imagination to portray it in all the exaggerations which fear and prophecy could invent."

Yet this Constitution, created without a model, planned by architects of consummate skill and fidelity, solid in foundations, beautiful in compartments,— which was "the most wonderful work ever struck off at a given time by the brain and purpose of man,"— which declared that the judicial power should extend to "all cases arising under the Constitution and the laws of the United States," and which might be construed to authorize the mere judgment of a court to set aside any law which the Legislature might pass and the Executive approve,— was now confided to the judgment and conscience of this court for construction, exposition and decree.

And now, who was to be called to lead and to guide this important work?

Paraphrasing one of Emerson's epigrams, I say that God never created a pure and able man and raised him up to perform great and noble deeds without confiding the secret to another soul. I believe John Adams' soul was inspired to appoint John Marshall. Brushing aside precedents and departing from the custom of promoting those already on the bench, he boldly appointed one who

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had never held a judicial position and who was wholly without judicial experience. An excellent lawyer is sometimes lost in a poor judge, but a divinity was there and then shaping our ends. All times and all people will do homage to John Adams for the sagacity, foresight and public spirit which prompted him to make this choice.

Marshall possessed each, every and all of the qualifications and attainments for a great judge. He was learned, educated and experienced; pure, patriotic and patient; impartial, firm and courageous; modest and of a sweet and equable temper; skilful and logical; solid, serious and profound, and possessed of an active and creative genius, of legal acumen, power of analysis, and the most marvelous and admirable powers of reasoning; a gentleman, a scholar, and a Christian; attached to the principles of free government, cherished republican institutions, and loved the Constitution.

To assist him in this work Story and Washington were upon the bench, and Pinkney, Wirt, Webster, Emmet, Dexter and Jones at the bar.

"It was an age of great arguments at the bar and great opinions from the bench. There were time and opportunity for both. The mercantile necessities of the people had not yet compelled the use by Judex of an hour glass, nor the substitution of citations of the latest authorities for a discussion of principles. Dialectics might still be wedded unto Fancy, and neither was doomed to celibacy. Every argument was alive and in motion — the statue of Pygmalion inspired with vitality. It was the golden age of the Supreme Court."

While Marshall was Chief Justice, the Supreme Court delivered one thousand one hundred and six opinions, and the decisions are reported in thirty volumes of reports,

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from 1 Cranch to 9 Peters, inclusive; five hundred and nineteen of these opinions were delivered by Marshall; eight dissenting opinions were filed by him, only one of which involved a question of constitutional law, Ogden *v.* Saunders. From 1801 to 1835, sixty-two opinions were given upon constitutional questions, in thirty-six of which the opinion was by Marshall, the remaining twenty-six being by one of the seven justices.

Marshall as the moving spirit and master mind of this court, without authorities to quote or precedents to cite, but solely by the solidity of his reasoning, his clearness of statement, his power of understanding, combined with the lustre of his learning, intelligence and integrity, successfully carried the Constitution throughout the experimental period and settled forever the question of its supremacy.

During the time he was Chief Justice the court construed and interpreted all the important provisions of the Constitution; established and sustained the supremacy of the United States; their right as against a creditor to priority of payment; to institute and protect an incorporated bank; to lay a general and definite embargo; to levy taxes; to pre-empt Indian land; to control the State militia; to promote internal improvements; to regulate commerce with foreign nations and among the States; to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy.

Further, the court considered and determined the many questions of implied powers incidental and necessary to carry out the express powers of the Congress, and it enforced the constitutional restrictions on the powers of the States; declared that they had no power or right to emit bills of credit; to pass *ex post facto* laws; to control

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or impede the Federal powers; to impair the obligations of contracts; to tax national agencies; to exercise power over ceded territory; to cripple commerce or defy the lawful decrees of the Federal courts. It subjected ministerial officers of the executive department to the control of the judiciary. It declared to the Congress that it could not override the Constitution. It defined the jurisdiction of the Federal courts, both original and appellate. It sustained the right of this supreme tribunal to supervise the decrees and judgments of the State courts when denying a right conferred by the Constitution.

We will divide the work of this court into two periods: 1801 to 1816, 1816 to 1835. During the first period the court was "In Dawning Youth;" the second was "Its Golden Age."

The first case in which Marshall had to deal with a constitutional question was Marbury *v.* Madison, 1 Cranch, 137, and the importance of this decision lies in the fact that the court announced that it had the right as well as the power to declare null and void an act of Congress which was repugnant to or in violation of the Constitution. It declared that the Constitution was to be regarded as an absolute limit to legislative power. Aside from the importance of this decision, it possesses a peculiar interest because it was distasteful to President Jefferson, incurring his wrath and provoking him to declare in his anger that it was "an *obiter* dissertation of the Chief Justice and a perversion of law;" nevertheless it was the corner-stone of Marshall's reputation.

After reviewing the earlier decisions of Chief Justice Marshall, the orator continued:

I have referred thus briefly to the important decisions in that period which marks the first half of Marshall's ju-

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dicial career. Important and varied as were the questions then presented and determined, still greater and more important were those yet to be decided. The exact and true method of interpreting the Constitution had not yet been ascertained or at least definitely settled. We now approach the picture which history has painted of the great battle which was fought for National Sovereignty. Marshall, Story and Washington upon the bench; Pinkney, Webster, Wirt, Emmet, Dexter, Martin, Hopkinson and Jones before it! Pinkney contemplating these times, in a moment of inspiration, exclaimed: "I meditate with exultation, not fear, upon the proud spectacle of a peaceful judicial review of these conflicting sovereign claims by this more than Amphictyonic Council. I see in it a pledge of the immortality of the Union, of a perpetuity of national strength and glory, increasing and brightening with age of concord at home and reputation abroad."

We have now entered the Golden Age of the Supreme Court. The most important matter first calling for determination by the court presented an instance of collision between the judicial powers of the United States and one of the greatest States, Virginia, on a point the most delicate and difficult for consideration and determination. The Constitution of the United States had not in terms granted to the Supreme Court appellate jurisdiction over the courts of the several States, and although silently acquiesced in at an early date, this jurisdiction was finally not only seriously questioned but absolutely denied by the State of Virginia.

The speaker then referred at length to the more important of Marshall's decisions, quoting from the opinions, and concluded as follows:

I have thus referred to the more important decisions

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rendered by the Supreme Court while Marshall was Chief Justice, and have briefly quoted from some of the opinions, to show principles which guided the court in expounding and interpreting the Constitution.

I indulge the hope that the work of this day throughout these United States may awaken such an interest among the people regarding Marshall that all of his opinions will be read, re-read and carefully studied.

I assure you that you can no more judge of their worth by what I may say of them than you can judge of the glories and powers of Niagara by a cupful of its waters.

These judgments and these opinions are now part of the Constitution itself, and without them it would have been incomplete. They construed as many powers out of the Constitution as were unquestionably enumerated in it. They are pellucid as the mountain stream, yet have the force of the torrent. They contain the fountain and termination of the juridical construction; at once its picture alphabet and completed language. Their topics being patriotic make their style lofty and pure. They contain more logic than images or illustrations. They abound in plain statements, rather than luxuriant amplifications. They put a gleam under every fact and cast a sunbeam upon every deduction, and thus made so clear that time, criticism, and comparison have not robbed them of a ray. The strain of legal dissertation is relieved by their Socratic method of reasoning. They took the inarticulate cry and the oppressed desire of the people for legal definitions of their rights and gave expression to one and action to the other, and sounded the weal and worth of civil liberty in strains as noble as can be found in poetry. They suggested, as I believe, to Webster his

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ideas of the "closeness," "compactness" and "inseparability" of the Union, and to Lincoln, "the people," "the whole of the people," and "all of the people." And all in all, considering their character, the time at and the circumstances under which they were formed and delivered, their plan, purpose and effect, they constitute the greatest and grandest judicature the world ever produced, and will endure as long as the elements of the stars.

When the Constitution passed into the hands of Marshall it was a written instrument, with powers enumerated but unconstrued and unexercised. It was a "form," but the blanks had to be filled. It was motionless and inoperative. The force and compass of Marshall's intellect slowly revealed its parts. His genius pierced its innermost recesses; found the key to hidden combinations; fitted the frames; discovered its powers, and the "form" was metamorphosed into a "governmental organism," and then, pervaded by Marshall's soul, it vivified, lived, lives, and will never die. Let us build altars to this man and his deeds and hereafter forever keep this day.

An address upon the life and work of Marshall would be incomplete without a reference to the trial of Aaron Burr at Richmond. The scenes at this trial are worthy of a description by Macaulay or a painting by Munkácsy. The place was historical. The plaintiff was the government, against whose peace and dignity the defendant had conspired. The crime was treason. The defendant was notorious. The counsel famous and the judge renowned. It was a legal trial of the defendant and a moral trial for the judge. Hamilton was Marshall's friend, and Burr

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had murdered him. Marshall loved the Constitution, and Burr had plotted to destroy it. President Jefferson, while an enemy of Marshall, intensely hated the defendant and used his office and powers against him, and the people clamored for his conviction.

Affections, sympathy, the desire to please friends and appease enemies, touched the heart, but duty ruled in the mind of the judge. He would not be bribed by the offerings of touching allusions to his departed friend; nor deceived by specious and smooth persuasions that, as the defendant was guilty of many other offenses, he was undoubtedly of this; nor overawed by the frowns and furious commands of an angry President. Without stooping to flattery or bending to estimation or bowing to power, he with stoical self-command so construed the provisions of the Constitution relating to treason that he wrung from the unwilling hands of a reluctant jury a verdict of acquittal for this detestable and detested wretch. Time has vindicated this judgment, and as long as Duty has a devotee and Justice a votary John Marshall will be revered and worshiped for his noble and heroic conduct at the trial of Aaron Burr.

Marshall was as good, if not as great, a patriot as Washington; wiser, if not as talented as Hamilton; nobler, if not as clever as Jefferson; and for Purity, Truth and Justice his star glitters the brightest in that constellation. I venture this sentiment for this day and occasion — the Constitution of the United States: It was a growth rather than a creation, and not the work of any one man; but Marshall was its Expounder, Webster its Defender, Lincoln its Preserver, and Eternity its Keeper.

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Address of President Geo. E. MacLean.

It is my privilege, in response to an invitation from the committee of the State Bar Association, to preside as a representative of the University upon this impressive occasion.

The volume of praise ascending at the shrine of Marshall must be swelled by every institution of learning and philanthropy enjoying in security munificent endowments. His decision in the Dartmouth College case, as to the sacredness of the contract for trust funds in the promotion of religion and education, has secured the confidence of donors and has taught them how to rear beneficent monuments to their names more enduring than brass. The very story of the case has taught loyalty to *alma mater* to successive generations of college men and instilled reverence for Webster and Marshall.

It is possible that the curtain is rising upon a fifth act in our country's history, that we as at length a world power are passing from the attainment of nationalism to an era of internationalism. Beyond this, dimly amidst the mist of war and diplomacy there floats the prophetic vision of Tennyson of the ultimate era in which

> "the battle-flags were furl'd
> In the Parliament of man, the Federation of the world."

We wait with suspense to see if the spirit of John Marshall shall still dominate in the decision the Supreme Court of the United States is about to hand down with reference to the government of our insular possessions. Marshall would not have been startled by the question, as is shown by his reference to the articles of confederation and perpetual union submitted as early as 1775 by Dr. Franklin. He says: "Into this confederation not only all the British colonies on the continent but Ireland and the

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West India Islands were to be admitted. The powers of Congress were to embrace the external relations of the country, the settling of all disputes between the colonies, the planting of new colonies."

Important as are these decisions to our national expansion and insular possessions, when I gaze into the faces of these hundreds of law students, the more momentous question rises, Will they, as leaders of our citizenship, follow the example and the ethical principles of Marshall, the man as well as the jurist?

The world is not yet free from the spirit of Aaron Burr, the ethics of whose practice, in the words of Magruder, "may be inferred from his definition of law, namely: 'whatever is boldly asserted and plausibly maintained.'" Contrast with the self-seeking profligate, able and artful Burr, Marshall and his principles. Of him it is said he was never a self-announced candidate for any office. In these days when many think that so-called "push" and "pull" obtain more than merit, and when politicians tend to follow the passing whim of the populace rather than to lead in the path of principle, let us of the bar and college hear Marshall, "We, sir, idolize democracy, we admire it because we think it a well-regulated democracy. What are the favorite maxims of a democracy? A strict observance of justice and public faith and a steady adherence to virtue. No mischief, no misfortune ought to deter us from a strict observance of justice and public faith."

Address of W. S. Kenyon, of Fort Dodge, on the Life and Character of Marshall as a Citizen.

That the character of this man was builded upon the enduring foundations of true manhood is attested by the events of his life, and in these later years by the tribute

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of his country to-day. No success can be permanent unless based upon a life true to itself. Never was more of wisdom or of life's true philosophy condensed in verse than the words of England's great poet: "This above all, to thine own self be true, and it must follow as the night the day thou canst not then be false to any man."

The old philosophers, who for man's guidance and orderly life promulgated the cardinal virtues of justice, prudence, temperance and fortitude, could have found them all in the character of Marshall. To him financial wealth was never life's goal; character and true manhood were to him the wealth of life, a wealth greater than money can ever bestow, a wealth within the reach of all, that makes the only pauperism — idiocy, that in the sense of Christianity and true philosophy makes every man and woman wealthy in the sum total of human happiness, whose character is founded upon the elements of true manhood and womanhood.

Biographers of Marshall delight to tell us that his life was a simple one. Indeed he combined within himself that purity of character and simplicity of life, always attributes of true greatness. We can in imagination see the awkward, ungainly lawyer passing along the streets of his native village, and afterwards at the capital of his State, both before and after his accession to the bench, pointed out to the inquiring stranger as the great lawyer and judge, never by reason of success afflicted with expansion of the head, or his eyesight so dimmed as to fail in recognizing an old friend. Upon his return from France, where the people had observed his sterling character and honesty, and where he had dignified American citizenship, been banqueted and feted, he changed not from the same plain, simple, every-day man. Kind to the children, in-

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dulgent to the weak, hating sham and snobbery,— none of the graces of a Lord Chesterfield,— indeed, passing sometimes from the farm to the bench with the burs affectionally clinging to his trousers, generally in trouble in preserving a consistent attitude of the high collars presented him by an admiring relative, and the necktie incident thereto.

Amidst all these commonplace scenes of his life he never forgot to dignify the title of man. Beneath his outer action was the great reserve force of pure and mighty character.

John Marshall, the citizen, possessed these elements of character essential to ideal citizenship in any age; reflection thereon is not without value in these days of citizens' movements, and of awakened and awakening public conscience. The industrious citizen of integrity, courage, unselfishness and gentleness will always be the ideal citizen; such was Marshall. Was he industrious? The volumes of masterly decisions from his pen that add luster to the pages of our jurisprudence, law writings of which it might be said as of Aristotle, "He dipped his pen in mind;" his preparation for forensic strife in legislative and constitutional assemblage, his life of Washington, all illustrate the tireless energy of the man Marshall.

That John Marshall as a citizen, either in private or public, was honest, that integrity was one of his chief characteristics, that honor was to him the priceless jewel of his life, has never been questioned. The brilliant Wirt being asked after the trial of Aaron Burr why he did not tell Judge Marshall that the people of America demanded a conviction, responded, "Tell him! I would as soon have gone to Herschel and told him that the people of America insisted that the moon had horns as a reason why he

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should draw her with them." It is true that Parton in his life of Jefferson has criticised Marshall for his alleged signing, as Secretary of State, commissions of newly appointed officials, far into the night preceding Jefferson's inauguration, and until stopped by Mr. Lincoln, Jefferson's Attorney-General. So contrary is the incident to the entire life of Marshall, so contrary to the circumstances surrounding Jefferson's inauguration, that the impartial judgment of history will hardly sustain the criticism. It is true of Marshall as the great Webster said of Jay, "When the spotless ermine of the judicial robe fell upon John Jay, it touched nothing less spotless than itself."

In the last few weeks a number of our great newspapers have given space to the express thought of eminent educators and thinkers as to the dangers threatening the nation in the twentieth century. I am not one of those who believe any danger can long threaten the great Republic. May I be permitted, however, to suggest in connection with this phase of Marshall's life, that, in my humble judgment, the greatest danger to our American life and citizenship to-day is in the increasing disregard of truth. Ne'er was diviner thought e'er uttered by human mind than the words of the old sage and philosopher of Concord: "Truth is the summit of being; justice the application of it to affairs." The disregard of the sanctity of an oath, the appalling growth of perjury in our courts and the difficulty of punishment therefor, untruthfulness in business transactions, in private and in public affairs, inspired largely by greed for gain or position and the desire to accumulate riches, in the commercialism of the age, is in my judgment the most deplorable fact in the citizenship of the Republic. How the life of Marshall refuted the idea that untruthfulness is necessary to success!

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Marshall loved the truth; he hated a lie; he loved nature, for nature is truth; and at the close of that long and eventful life he could look every man squarely in the eye and owe to none an apology, for his life had been true, and none had he intentionally ever wronged.

Truth made essential that other element of his character — courage — the boy who went out in his young manhood to fight the battles of human liberty; he who stood with the old Continentals against the trained soldiery of the British Empire at Brandywine, Germantown and Monmouth; who suffered with stout heart and exuberance of spirit the misfortunes and trials of that era, was not the man in civil life to ever shirk a responsibility or dodge a duty; he was never too busy to do his duty as a citizen, never too good to go into politics. To his country in war he offered his life; to his country in peace he gave his best service. What higher patriotism can the nation demand or the citizen exhibit?

In civic life he was absolutely fearless, uninfluenced by popular passion, listening not to the voice of clamor, standing by the Constitution against the efforts of his own constituency, fearing not to leave the old Articles of Confederation and push on into the unknown domain of constitutional government; an intense Federalist, the party whip had no terror for him; great enough to differ with his party, courageous enough to express that difference. Censured and maligned in the Aaron Burr trial, with a seething volcano of prejudice ready to burst all around him, he pursued the even tenor of his way, unmoved and unmovable.

I could not close my remarks as to Marshall's life as a citizen without reference to his home life and those traits of gentleness in the man which oft proclaim the

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true gianthood of character. It is not always in the calcium light of public life that we can best observe men. The fireside invoice is generally correct. It needed not the voice of a Ruskin to bring the message that "One of the probable signs of high breeding in men generally will be their kindness and mercifulness."

We read of his loving kindness to a sick wife — never too absorbed in the great problems that rack men's brains but that he could find time to minister in acts of loving kindness to her every want, exhibiting in this respect those traits of character which to-day, regardless of party, have endeared the present chief magistrate to the great heart of the American people.

The great brain of the many-sided Marshall, the brain that could evolve the masterly opinion of Marbury *v.* Madison, that could equip the man in unanswerable argument for forensic strife, could make him an equal in diplomacy with Talleyrand, yet could lay aside all care and furnish to the simple game of quoits a boyish enthusiasm and find there a renewal of youth.

To such a character, friendship must have been a precious thing, and into the life of Washington there never came a truer friend. In those constructive days of government amidst the strife of ideas and the clouds of criticism, the voice of Marshall was ever heard in defense of the calm and patient man who with steady hand was carefully guiding the new Ship of State amidst the shoals of untried governmental seas.

May the life of the great Chief Justice ever be to the citizenship of the Republic an inspiration to truth and virtue; to the younger manhood of the nation, with its matchless and illimitable possibilities, an inspiration toward the higher attributes of life, towards a realization

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that character and manhood are within the reach of all, and that true wealth is noble character; to the law maker and interpreter an inspiration to the just and equal and common-sense administration of all laws.

While Utopian ideals are but dreams, yet in viewing the pure and simple life of this eminent citizen may we not hope, be it dream or be it fact, that the future citizenship of the Republic may be founded upon the old precept of the apostle St. Paul. For all the law is fulfilled in one word even in this, "Thou shalt love thy neighbor as thyself." Then shall earth's manhood tend more and more toward that perfect day of ideal citizenship, of which prophetic are the morning hours of this splendid twentieth century.

Address of James C. Davis, of Keokuk, on the Politics, Public Services and Political Associations of Marshall.

If John Marshall's career had ended on the 4th of February, 1801, if he had never sat as Chief Justice of the Supreme Court of the United States, if he had never rendered a single judicial opinion expounding and construing the Federal Constitution, yet his name would have been handed down in history as one of those able and patriotic statesmen who, in the early and perilous days of the Republic, were imbued with the principles and teachings of the Federalist party, who recognized the necessity of a strong and respected central government, and one of those men by whom the administrations of Washington and Adams were sustained and strengthened, and who were potent factors in laying the foundation of Federal power and prestige so broad and deep that it has permanently sustained the magnificent governmental edifice which we now venerate and enjoy.

The sentiment allotted to me this evening, the

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"Politics, Public Services and Political Associations of John Marshall," is confined, as I understand it, to that twenty-five years of his eventful life from the period of his majority until his elevation as Chief Justice of the Supreme Court.

After tracing this history and referring to the leading decisions of Marshall on the Constitution, the speaker concluded:

In a word, this great man, satisfied beyond peradventure that the principles of a party were correct, by his clear conceptions of the meaning and purpose of a written Constitution, changed an experiment in a republican form of government to an assured, a permanent and an unexampled success.

We are ever reminded that history repeats itself. A hundred years ago the young Republic, tottering, feeble, and of uncertain existence, was confronted by these great constitutional questions, upon the correct solutions of which depended the prosperity and the existence of the nation. To-day, by these inscrutable changes which have so much to do with the history of individuals and of nations, we are confronted by conditions which, if not of equal gravity, are pregnant with problems of great moment. The march of the world is to higher and better things. The spirit of the time is growth and expansion. The restless energy of seventy million American people can no more be checked than the irresistible flow of a mighty river on its way to the open sea. By a series of events which seem almost providential, the flag of America, the emblem of progress, prosperity and the equality of men, now floats over distant islands, and shelters beneath its protecting folds alien people. May the present great constitutional questions be so wisely solved

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by another Marshall that the progress of the Republic may not be retarded, and we may go forward in the future as in the past, and by precept and example proclaim unto all peoples and all nations the great truth upon which our national life is founded, "that all men are created equal."

Address of Gov. A. B. Cummins, of Des Moines, on The Court and the Judge.

Influenced by the spirit which, during this interesting day, has pervaded our profession throughout the length and breadth of the whole country, I must assume that the "Court" of which I am to speak is the Supreme Court of the United States, and that the "Judge" is he whose life and labor we have gathered to honor and commemorate.

Many eulogies have been pronounced upon the Supreme Court of the United States. The periods of praise, melodious and beautiful, have poured from the patriotic hearts and glowing minds of the most profound jurists, the most renowned statesmen, the most brilliant orators, known to the history of the Republic. Pinkney, Wirt, Emmet, Webster, Choate, Miller, Dillon, Cooley, and a host of others have so illuminated the subject with wise eloquence that it is well nigh impossible to find an open place either for the finger of analysis or the flowers of tribute and admiration. I fear, therefore, that I will be put down as either sublimely egotistical or surpassingly eccentric, or both, when I say that although I have been a somewhat diligent reader of the literature pertaining to the subject committed to my care, I have sought in vain for an exact expression of the reasons which, as it seems to me, unite to make the Supreme Court of the United States what

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every observant man here and everywhere concedes it to be — the most august, imperial, important and powerful judicial tribunal of either ancient or modern times. I venture with much misgiving and with great diffidence to suggest why it is that this court, without respect to the ability of its members, stands apart from and immeasurably above any court that ever preceded it, and why it is that it is not to be classified with the tribunals which other nations have created for the administration of justice among men.

Its rank is not to be imputed to the quality of its judges, for Nature is fair and just in her distribution of genius, and we must concede that the judges of other lands, under the circumstances which have surrounded ours, would have done as well. The distinguishing superiority of the Supreme Court of the United States is to be found in the functions it performs. Its powers are so mighty, and its responsibility so tremendous, that it makes of its members — the small men great, and the great men giants. Broadly speaking, the chief reason that the Supreme Court of the United States occupies so solitary a preeminence is, that it is a political as well as a judicial body. You will understand that I use the word "political" in its highest and noblest sense. It is somewhat more than a co-ordinate branch of the government. It is not only independent and uncontrolled in the purely judicial sphere, but it is paramount to the legislative and executive departments of the government in many respects in which, prior to its creation, these departments had been supreme. It is the most direct representative of the whole people, as a people, known to our laws. It is the only body in our government that has no master. It not only administers justice in the way in which judicial

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tribunals before it had been accustomed to do, but it does what no judicial tribunal before its time ever did — it stands between the people and both the legislative and executive branches of the government, and stays the encroachments, not only of the President, but of Congress, upon the rights and reservations of the people in their original capacity, and not only of these, but of the legislatures of the States as well. It is the guardian, exponent and voice of the Constitution, whence flows a power which, in our land, is the fortunate substitute for revolution, to amend the evils of usurped authority.

In 1787 the idea of limiting the power of executives was very old, and the idea of limiting the dominion of the legislative branch of government was not altogether new, but the idea of instituting a tribunal clothed with the right to confine the legislature within the boundaries traced by the people in originating their government, was, as a practical measure, wholly new, and the Supreme Court of the United States was its first genuine exposition. The majesty of such a tribunal may have been but little appreciated in the early days of a weak and struggling Republic, but as the twentieth century opens with the United States overshadowing, from all points of view, every civilized nation, with a population of eighty-five millions (I include the Philippines), with unexampled wealth, with incredible energy, with unsurpassed intelligence, and with a development that challenges the miraculous and outstrips the imagination, it ought to fill the mind with reverence and awe to look upon this court, remembering that it has constitutional power not only to arrest the steps and thwart the will of the Executive, with his army and navy, his generals and his admirals, but to nullify any act of the Congress of the United

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States and to strike down the laws of forty-five general assemblies. It is, indeed, august and imperial; and it well becomes us all to reverentially salute the most commanding institution of all the institutions of the earth. Attributes so sovereign and dominant might excite fear and apprehension, but when we recall the benign exercise of this vast power, and remember that during more than a hundred years it has been so administered that the smallest right of the humblest citizen has found a sanctuary in its serene presence; and moreover that those high problems which have concerned the life, the honor, the glory, the growth and perpetuity of the nation have been solved with unexcelled wisdom, with the most faithful patriotism and with the purest integrity, disturbed by no passion and clouded by no unworthy ambition, we ought to kneel to the Providence that ordained the Supreme Court of the United States.

It is possible that I have not yet made good the assertion that the Supreme Court always has been, and is now, a political body, and that the gravest duties it has discharged are those which, at the time of the adoption of the Constitution, belonged to the field of statesmanship rather than to the field of law. If the members of the Constitutional Convention of 1787 had been in complete harmony, they could not have formulated an instrument granting to the General Government the powers which were intended to be conferred upon it, without the use of language susceptible of more than one meaning. Such is the diversity of civic, personal and commercial relations that no broad and general rule can be announced which does not demand interpretation as often as it is invoked. Bearing this in mind, and remembering that the Constitution was the product of fierce dissension, and

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of public views as widely separated as the poles themselves; that compromises were often effected in form rather than in spirit, and that not infrequently each of the disputants believed that he had the better of his opponent in the modified expression finally adopted, it is easy to understand that the Constitution was delivered to its interpreter, the Supreme Court of the United States, so phrased that in its most essential parts it meant the thing that the court believed it ought to mean. If Thomas Jefferson, or any one in sympathy with his understanding of the Government that had been formed, had decided the cases which came before the Supreme Court in the first twenty years of its existence, the Republic would have been dismembered long before the people had an opportunity to know how necessary it was that the bond of union should not only be indestructible, but that the General Government should be the most potent force of the nation. In far the greater number of the decisions which command our greatest admiration for the exalted tribunal which announced them, the result depended upon the political opinions of those who pronounced them. The inquiry, What ought the government of the United States to be, was the most important question in determining what the Constitution is. I am far from asserting that violence has been done to the language of the Constitution. I mean only to say that the construction put upon it has been an introspection as to what the judges would have meant, had they been framing a Constitution for the United States, and had they used the language submitted for their application.

The wisdom of our forefathers was great, but in no respect greater than in taking away from Congress, with its tides of partisan feeling, its turbulent debates, and its

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selfish motives, the right to determine what the Constitution means. No more persuasive proof of the proposition I have stated can be found than in the task but lately imposed upon the court, and in the performance of which it is now engaged. The status of Porto Rico and the Philippine Islands is of deeper import than any question ever considered by John Marshall or any of his associates. I cannot doubt that the same hand will guide the court now that led it in years gone by; but there is no certain criterion in the Constitution for the problem to be solved, and that the outcome must be reached through the consciousness of the judges of what the government of the United States ought to be, with respect to the new territory, there can be no doubt whatsoever. How startling the suggestion would be to an Englishman that any court of Great Britain should decide what the relation of the people in the South African republics to the Crown must be.

I must be content at this time with the barest outline of the thought I am endeavoring to express, and I may not make my meaning clear. I am looking for the cause which established for this tribunal its place in the judicial procession of the civilized nations, and I find it in the framework of our government. It is the very genius of our institutions. The highest duties of statesmanship and the most delicate and difficult offices of organized society were transferred from the halls of legislation to the forum of a court full of dignity, rich in learning, and replete with wisdom. It was a revolution; but it saved the Republic, so that we who are looking upon the structure after the space of more than a hundred years, find it fitted to endure so long as the statesman as well as jurist shall interpret the Constitution and declare its true meaning.

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Unquestionably the power given to the Supreme Court of the United States to annul an act of Congress or a legislature because it is in violation of or repugnant to the Constitution is the greatest ever conferred upon a judicial tribunal. It, however, properly inheres in the courts of every government originated by and operated under a written constitution. This power early impressed our English friends, and I happened lately upon a most astonishing account of it in the lectures of Charles Austin, who, by universal consent, ranks among the first as a student of the science of jurisprudence, but whose reference to American institutions is as remarkable as it is laughable. He says in his thirty-ninth lecture — upon the subject of the disadvantages of judicial legislation:

"A curious account of this plan was mentioned to me by Colonel Murat, son of the late King of Naples, who, curiously enough, has practiced as an English barrister in the Floridas, and seems to have a very pretty knowledge of English law. He says that the acts of the legislatures of those American States in which he has resided are habitually overruled by the judges and the bar. At the beginning of every term they meet and settle what of the acts of the preceding session of the legislature they will abide by, and such is the general conviction of the capacity of the State legislatures and of the comparative capacity and experience of the judges and the bar, that the public habitually acquiesce in this proceeding. Accordingly, if a law which the profession has agreed not to obey is cited in judicial proceedings, it is absolutely rejected and put down by the lawyers *sans ceremonie*. In such a case as this it is evident that the statute law is not certain law unless it chime in with the opinions of the judges and of the bar."

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While we who live in America under written constitutions, both Federal and State, easily perceive the exaggeration of the extract I have quoted, nevertheless, the freedom with which our courts repudiate an act of legislation must amaze our brothers across the sea.

In the early part of this paper I may have intimated that the Supreme Court of the United States was the first tribunal to exercise the power of setting aside a solemn act of legislation. This is not technically, although it is substantially true. It was claimed by one of the judges of the Court of Appeals of Virginia in 1783 that the court might disregard the mandate of the legislature, but the point was not decided. It was mooted in Rhode Island, North Carolina and New Jersey, but the doctrine was so slightly thought of and had been so universally rejected that when it arose in the Supreme Court of the United States in Marbury *v.* Madison it was *res integra;* but since that time it has never been questioned.

The progress of the court toward the plenitude of its power was slow; for even the most determined Federalists did not adequately comprehend the strength of the government for which they had so strenuously labored. In the early days many nominations were declined and many resignations were offered in order to retain or accept places which now are obscure in comparison with a membership in the great court of the world. Even John Jay, the first Chief Justice who was tendered the office a second time, in December, 1800, wrote to the President in refusing the honor:

"I left the bench perfectly convinced that under a system so defective, it would not obtain the energy, weight and dignity which was essential to its affording due support to the National Government, nor acquire the public

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confidence and respect which, as the court of last resort of the nation, it should possess. Hence I am induced to doubt both the propriety and expediency of my returning to the bench under the present system."

How limited the horizon of human view when this eminent patriot could not discern the dawn of the approaching splendor of a court over which he was twice invited to preside, and which when he uttered this despairing prophecy had been in existence more than ten years.

It is not true, however, that the court waited wholly for the advent of John Marshall. In 1794 the court held firmly that the terms of the Treaty of Peace could not be impaired by State laws, and later re-affirmed its conclusion in a case wherein Marshall, as an advocate, earned his greatest fame.

About the same time it subjected the States to its jurisdiction and rendered judgment against the sovereignty of Georgia for a debt. This decision raised a mighty storm, for it revealed a glimpse of the true character of the forces of the Federal Government and foreshadowed the subordination of the States. The country was in a tempest and the waves of passion never ran higher; but the court was unmoved, and, while an amendment to the Constitution changed the law, the contest left the court better equipped for the arduous labors of the future.

And then came John Marshall, and with him Marbury *v.* Madison, or rather Marshall *v.* Jefferson, in which Congress was shown its constitutional frontier, and that there were sentries to keep it within its own land. And then Little *v.* Barreme, in which the President was told that the Constitution was over and above him, and that his unwarranted instruction to an officer could not legal-

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ize a trespass. And then United States *v.* Peters, in which Pennsylvania was taught that resistance to a decree of the Supreme Court was rebellion and that treason might follow in its wake. And then Fletcher *v.* Peck, which swept away the supremacy of the States and subjected every legislature to the Constitution as interpreted by the Federal voice. And then Martin *v.* Hunter's Lessee and Cohens *v.* Virginia, which opened up the pathway from the highest appellate tribunals of the States to the Supreme Court of the United States; opinions which brought the country dangerously near the verge of dissolution; but which finally vindicated the authority of the whole over the jealousies of a part. And then M'Culloch *v.* Maryland. I pause a moment upon this decision. I can conceive of no more critical time in the entire progress of the Republic than the hours in which the general clause of the Constitution upon which the controversy arose came first under review. The mere lawyer was lost in the vast limits of the occasion and the patriot-statesman wrote the opinion. It was not as a disciple of the learning of the law that Chief Justice Marshall said:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended; but we think a sound construction of the Constitution must allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

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This utterance is not a statement of law; it is a chart of government. And so it was decided that the United States could institute a bank and the States could exact no tribute from it.

The time allotted to me forbids the mention of the succeeding steps through which the court slowly but surely built up the most imposing and perfect structure in the architecture of nations. The work was not all done in Marshall's time. Long after him came a man from our own beloved State, whose grasp upon the vital subjects of government was as firm, whose views were as broad, and whose knowledge was as profound as the great Chief Justice; but I must leave his memory amongst you with this bare reference to his high place in the court of which he was so distinguished a member.[1]

The work is not yet done, for, while the relations of the States to the United States and the powers of the Federal Government over the people have been fixed beyond dispute, we have yet to discover what the Constitution is in other lands. We have yet to hear the decree which will announce to us how the Orient can become a part of the United States, and what forms of government can be instituted under the charter of a republic. As time goes on, other questions of like or greater importance will reach this arbiter of our destiny. We rest content in the reflection that mighty as the power is, it must exist somewhere, and that with us it has been confided to the wisest, safest, purest tribunal of which the wit of man can conceive. Thus it is, when I think of the Supreme Court of the United States, it is not as a figure of justice, repairing the individual wrongs of those who seek redress, but as the creator of the Constitution as we now understand it, as the force which has directed the current of our na-

[1] Referring to Mr. Justice Miller.

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tional life, as the keeper of the integrity of the Union, and as the guide through the mysterious realm of a future greatness. Our constant prayer ought to be that its opinions upon the concerns of state may be cherished and respected until the last moment of time, for when they fail to command the confidence of the people, the government is tottering toward its fall.

As I look upon the Supreme Court, so I look upon John Marshall. As a mere judge of private disputes, he has had many equals and some superiors, but as a statesman, his perception of what the government should be to accomplish its divine mission, his courage in doing what he believed to be his duty, and his exalted honor in every hour of his life, have never been surpassed in the history of his country.

Address of William McNett, of Ottumwa, on Marshall as an Expounder of the Constitution.

At the end of a century from the appointment of John Marshall as Chief Justice of the Supreme Court of the United States, we are assembled to do honor to his memory, and to recount his great qualities and achievements as a soldier, lawyer, diplomat, statesman and judge.

It has fallen to my lot to consider, for a brief time, his great work as an expounder of the Constitution of the United States. Renowned as he was in other fields of labor, it is in this that his transcendent genius bore its rarest and ripest fruits, and won for him a great and enduring fame. As was said of him by his great contemporary on the bench, "even if the Constitution of his country should perish, his glorious judgments will still remain to instruct mankind, until liberty shall cease to be a blessing, and the science of jurisprudence shall vanish from the catalogue of human pursuits."

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When he assumed the office of Chief Justice, the Constitution was in the experimental stage, and but two cases involving its construction had come before the court. The power of the court to declare an act of Congress or of the legislature of a State unconstitutional, was new, novel and undetermined. No light was thrown upon it by the English constitution, because no power existed in the courts of England to declare an act of Parliament invalid. The exercise of this power, which is now firmly established, pertains exclusively to American jurisprudence, and grows out of the peculiar nature of our written constitutions.

It has sometimes been asserted that in the course of the great opinions which he delivered upon various questions involving the interpretation of different features and clauses of the Constitution, he was dominated by a desire and purpose to enlarge and extend the powers of the nation, and so to create a strong centralized government at the expense of the reserved powers and sovereignty of the States, and that he assumed for the court over which he presided jurisdiction and powers which the framers of the Constitution never intended.

An attentive consideration of his judgments will furnish a complete refutation to this charge, and a sufficient answer is found in the fact that in the first case in which he was called upon to construe the Constitution, that of Marbury *v.* Madison, he declared an act of Congress to be unconstitutional, and thereby refused, for his court, to assume a jurisdiction which Congress had sought to confer upon it.

He has also been criticised by the school of "strict construction" for assuming that the Constitution conferred upon the Nation certain *incidental* powers, in pursuance

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of which it became the duty of the court to pronounce various acts of the State legislatures repugnant to the Constitution which were not embraced within the *letter* of the instrument. As against this charge I shall presently permit him to urge his justification in his own language, but for the present will observe that in applying this construction to the written Constitution he was but applying a well settled rule of interpretation of written instruments: that what is fairly implied is as much a part of the writing as what is expressed. By the advocates of State sovereignty he was accused of so interpreting the Constitution as to constantly enlarge the sovereignty of the Nation at the expense of the sovereignty of the States; but in M'Culloch *v.* Maryland, in 1819, he states the position of the court in the following clear and explicit language, which should forever after have silenced that criticism. "In America the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." A whole volume could not better define the real constitutional sovereignty of the Nation and of the States. Each is sovereign in its own sphere, neither is sovereign in the sphere of the other.

Marshall belonged to no political school of construction and had no theory of government to maintain except that found within the borders of the Constitution. He was a profound believer in the ultimate destiny of the Nation under the Constitution, and took that broad and liberal view of its provisions which presupposed such a Nation as would answer the ends foreshadowed in the preamble, "to form a more perfect union,

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establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

He was a firm believer in the National Idea. Viewing the Constitution as a whole, and considering the objects outlined in the preamble, the great governmental departments, executive, legislative and judicial, which it created, and the vast and varied powers which it conferred upon the Nation, to levy and collect taxes, borrow money, regulate commerce, enact naturalization and bankrupt laws, coin money, establish a postal system, promote science and the arts, punish piracies, declare war, raise and support armies and navies, appoint and receive ambassadors, establish high courts of judicature, endowed with jurisdiction pertaining to matters of the greatest moment, such as causes affecting ambassadors, ministers and consuls, controversies between the States, treason, and the like, together with certain powers, also of a high and sovereign character, which were prohibited to the States, his far-reaching and keen mental vision enabled him to understand and see clearly that *such* a government, endowed with such great and varied powers, possessed attributes of the highest sovereignty, and was no longer the feeble and tottering league of States which had existed under the Articles of Confederation. He also saw clearly that the Constitution and Nation both owed their existence to the people and not to the States; and that within the sphere of its delegated and implied powers the Nation was answerable to the whole people and not to the States.

In M'Culloch *v.* Maryland he says: "The Constitution when thus adopted was of complete obligation, and bound

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the State sovereignties. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then, is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit. If any one proposition could command the universal consent of mankind, we might expect it would be this — that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all, it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The Nation, on those subjects on which it can act, must necessarily bind its component parts."

Here the great Chief Justice reaches the high-water mark of great statesmanship and profound political philosophy. In these great sentences we see the government of the Union, sovereign in its sphere, stand out before us in its majestic perfection; no longer a mere league, formed and controlled by the States, but a magnificent federal Union, pregnant with high destinies and great possibilities for the future welfare, not only of the American people, but of mankind everywhere in the wide world. Catching the inspiration of John Marshall's

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vision of the destiny of the Republic under the Constitution, Chief Justice Chase, fifty years later, in the celebrated case of Texas *v.* White, 7 Wallace, uttered these profound words: "The Constitution in all its provisions looks to an indestructible Union composed of indestructible States."

The great Chief Justice, though the most profound student of the Constitution whom the Nation has produced, was unable to discover within its folds an "open door" through which a State could pass out of the Union. No greater or more conclusive argument against the heresy of secession was ever uttered by the lips of man than is contained in the great opinion of Marshall from which we have quoted, and yet that argument did not finally prevail until it was sealed and sanctified by the blood and treasure of the Nation.

The twin political heresies and dogmas of States Rights and Strict Construction kept on apace, and bore at last their bitter fruits.

In the course of time and events, these views of the Constitution blossomed out in 1856 in the Dred Scott decision, which convulsed the Union to its center and hastened on that irrepressible conflict which culminated in the most stupendous struggle of modern times. This decision annulled the Missouri Compromise Act, which for thirty-seven years had marked the boundaries of slave territory, and in some sense had formed the basis, if I may use the phrase, of an armed neutrality between the friends and enemies of the extension of slavery, and thus left an open door for the slaveholder and his human chattels. But the culmination of the insidious doctrines of States Rights and Strict Construction was not yet reached; it did not bear its fully ripened fruit until, in

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the face not only of threatened dissolution of the Union but of open and flagrant violation of its constituted authority by our erring brethren of the South, President Buchanan deliberately sat down, adjusted his glasses, carefully read over the Constitution, and then solemnly announced to Congress in his annual message of December 3, 1860, that he could find no authority in the Constitution delegating power to Congress, or the Nation, to coerce a State into submission. Let it be emphasized that this was said after he had declared in the same message that the Union could not, under the Constitution, "be dissolved at pleasure by any one of the contracting parties," and that "it was designed to be perpetual."

At this time another had appeared upon the scene. One of those men, of extraordinary mould, whom Providence supplies for great crises, and who appear at great moments in the history of the world. A plain man of the people. A man who believed in the people, who trusted in the people, and was trusted by them. A man who believed in the Nation, who believed that it was a NATION, begotten of great events, and destined to great ends and perpetual existence. A man who believed in the Constitution of the United States, and that all the attributes and powers of the Nation which he so much revered were directly based upon and drawn from the Constitution; a man who revered the memory of John Marshall, had been a deep student of his great opinions, and had imbibed his ideas of the Nation under the Constitution. A man of the same mould, the same love of liberty, and the same pure and exalted sense of justice. I need not tell you that this man was Abraham Lincoln. It was a solemn moment for the Nation and the world, when, on the 4th day of March, 1861, he took the oath

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of office as President of the United States, and, through his inaugural address, declared the views which he entertained of his constitutional duties and powers, and the policies which must control the government in the impending crisis, a crisis which had attracted the attention of the world to the land which had been the cradle of liberty, and upon the perpetuity of whose institutions the hopes of the oppressed of other lands reposed. The striking difference between the ideas which he entertained of constitutional power and national sovereignty from those of his predecessor clearly appears by the following extract from his inaugural address:

"I hold that in contemplation of universal law, and of the Constitution, the union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. *It is safe to assert that no government proper ever had a provision in its organic law for its own termination.* Continue to execute all the express provisions of our National Constitution, and the Union will endure forever, it being impossible to destroy it, except by some action not provided for in the instrument itself. I therefore consider that in view of the Constitution and the laws, the Union is unbroken, and to the extent of my ability I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States."

Such were Lincoln's views of the Constitution, and they breathe the same national sentiment, and announce the same views of national sovereignty, which the opinions of Chief Justice Marshall, covering a period of over thirty years, sought to establish and inculcate. Lincoln found ample power *inside* the Constitution to coerce a

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State, and it is passing strange that the contrary view should ever have been entertained, for the law of self-preservation is fundamental with nations as it is with men.

The result is part of our history, and a very great and glorious part. Under the Constitution, and to defend it, more than a million men assembled from every part of the land acknowledging allegiance to the Union, and in a contest stretching over weary and eventful years the battle of the Union under the Constitution was fought and won. And now everywhere over this broad land, north, south, east and west, the supremacy of the Union, within the sphere of its constitutional sovereignty, is fully recognized, and everywhere the sentiment is applauded that government of the people and by the people shall not perish from the earth. And to whom more than to John Marshall is due this glorious result? It has fallen to the lot of few historic characters to have their views of the theory and powers of government so fully vindicated by time and great events. It is not too much to say that upon his constitutional opinions rests the whole fabric of American constitutional law.

Exercises at Des Moines.

The day was celebrated at Des Moines by the Polk County Bar Association at a banquet held at the Savery House. The celebration was well attended by members of the bar, and an address was delivered by Frederick W. Lehmann, of St. Louis. The address of Mr. Lehmann, omitting biographical and other matter already given, and references to Marbury *v.* Madison, M'Culloch *v.* Maryland, and Cohens *v.* Virginia, is as follows:

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Address of Frederick W. Lehmann.

When John Marshall was appointed Chief Justice of the United States there existed for the country a grave emergency, and for him a great opportunity.

The Supreme Court had been in existence eleven years. Its bench had been occupied by men conspicuous for their talents and character, who had dealt becomingly with questions of the greatest importance; but it had not succeeded in gaining for itself the public confidence, and was, indeed, the object of a bitter and openly-avowed political opposition.

Of the six men originally appointed by Washington, only one, William Cushing, remained in office. James Wilson had died, Robert Hanson Harrison, John Rutledge and John Blair had resigned. Thomas Johnson, appointed to succeed Rutledge, had also resigned, after eighteen months of service. Thus, within the short space of eleven years, there were four resignations, and, in addition to this, three men, to whom the position of Associate Justice was tendered, declined it.

The record of the Chief Justiceship in this respect is even more remarkable. Nine men have been appointed and commissioned to this office, and of these John Marshall, appointed a hundred years ago, was the fifth in order. He had as many predecessors as he has had successors.

The controversies with respect to the Constitution of the United States did not end with the adoption of that instrument as the framework of our national institutions, nor yet with the adoption of the first ten amendments. Some of its opponents, like Luther Martin, became its staunchest supporters, but in the main the division of opinion, which showed itself in the Federal conven-

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tion, and later in the conventions of the States, continued, and, so far from abating, increased in force and virulence. On the one side was Hamilton, fearing that the Constitution was after all but "a frail and worthless fabric," inadequate to its purposes, while upon the other was Jefferson, who saw in it, unless restricted by narrow and rigorous construction, a form of government so strong that it threatened the overthrow of the States and the subversion of all popular rights.

The election of Washington as President was a circumstance of the greatest good fortune. The universal respect for his character gave a sanction to measures of government which otherwise they could not have enjoyed. But, long before the close of his second term, parties had formed, and his retirement to private life was awaited as the favorable occasion for beginning a strong reactionary movement.

At this distance of time, and in the light of subsequent history, it is hard to discover anything in the measures of his administration to give rise to the complaint that, "in place of that noble love of liberty and republican government which carried us triumphantly through the war, an Anglican monarchical and aristocratical party has sprung up, whose avowed object is to draw over us the substance, as they have already done the forms, of the British government;" but distrust of authority was then very general. It was an era of rebellion. Hardly had the revolt of the American colonies come to a successful termination than discontent took aggressive form in France, and an oppressive system, which had endured for centuries, was overthrown almost in a day. Sympathy with France and with the aspirations of her people was natural. They had helped

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us to independence, and we could not be indifferent to their efforts for liberty. In the conflicts between France and England that ensued it was easy to overlook the interests of the United States and to be governed by prejudice against England and predilection for the country of Lafayette. French agents and ministers labored assiduously to embroil this country in their quarrel, and the steady resolution of Washington to hold it aloof excited bitter crimination against him. The alien and sedition laws passed during the administration of Adams were aimed at these French intrigues; but they were unwise measures and called from Hamilton the warning, "Let us not establish tyranny; energy is a very different thing from violence." From Jefferson they elicited the celebrated Kentucky resolutions of 1798, in which he affirmed that the Constitution was a compact between the States as such, "that to this compact each State acceded as a State, and is an integral party, its co-States forming, as to itself, the other party; that the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself as well of infractions as of the mode and measure of redress." Further, he proposed that the States severally should nullify the alien and sedition laws and other laws of Congress specified in the resolutions, and treat them as void and of no force.

With some modifications, the resolutions, as framed by Jefferson, were passed by the legislature of Kentucky. Other resolutions, milder in form, but still asserting the

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doctrine of nullification, were passed by the legislature of Virginia. These resolutions met with no countenance from the legislatures of the sister States, and, indeed, their doctrine of nullification was expressly disavowed by the New England and Middle States; but, none the less, and it was significant of popular opinion, at the next general election their author was elected to the Presidency.

If this doctrine should prevail, the Constitution would prove indeed to be "a frail and worthless fabric;" but the course of events, dominated by causes beyond the reach of legislative acts and resolves, was in another and a better direction.

The industrial and commercial conditions of the time had much to do with the repugnance to a strong National Government. The industries of the people were few and simple. Nearly all were engaged in agriculture, but few in commerce, and still less in manufactures. There was not the interdependence that comes from a great diversity of pursuits. Every man felt sufficient unto himself, and wanted nothing so much as to be let alone, and especially so by the tax-gatherer. The means of travel and transportation were crude, and there was but a very limited intercourse between the different sections of the country. The people of one State did not know those of the others, and not knowing did not trust them, and so looked with jealous eye upon the assertion of power by the National Government, as in this they felt they had but little part, each State being, so far as national authority was concerned, at the mercy of the others. It was a critical period and fraught with constant menace to the perpetuity of the Union.

In an especial sense the Federal judiciary was the object of this local jealousy. The judiciary article of the

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Constitution was vigorously assailed in the conventions, as it was feared that the jurisdiction conferred upon the Federal courts would leave little for the local tribunals to act upon. The decision in Ware *v.* Hylton, upholding the provision of the treaty of peace in favor of British creditors against the sequestration and confiscation acts of the States, gave great offense to the many who were adversely affected by it. The result in Chisholm *v.* Georgia was especially unpopular. The idea that a State should be subject to suit by citizens of another State, and in a forum not its own, was entirely inconsistent with the theory of State sovereignty. Many of the advocates of the Constitution, pending its adoption, John Marshall among them, had disclaimed the construction of the Constitution afterwards placed upon it by the court, and it was certainly unfortunate that the question had not been put by the framers beyond the field of controversy. In view of the language employed, it is difficult to see how the court could have decided otherwise. An eleventh amendment was promptly adopted, establishing the popular view.

One of the last acts of the Federal party was the enactment of a new judiciary law. It relieved the judges of the Supreme Court from Circuit Court duty, increased the number of circuits, and added twenty-three to the judicial officers of the United States. The appointments made by Adams to these new places angered the Republicans greatly, and, as Marshall was at the time his chief cabinet officer, he necessarily shared in the enmity incurred.

The election in 1800 had resulted in a pronounced victory for the Republicans. They had now the Presidency and a majority in the House and Senate; none the less they felt cheated of the fruits of victory. The judges

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were all Federalists and would hold for life, and unless some plan could be found to get rid of them, what was done for the cause of Republicanism in the legislative councils would be rendered as naught in the courts of justice. War, therefore, bitter, uncompromising war, was to be waged against the courts. Repeal of the new judiciary act was one part of the programme, and the process of impeachment suggested a means of reaching those not affected by the repeal.

Such was the prospect when John Marshall entered upon the duties of Chief Justice of the Supreme Court of the United States.

When Adams reorganized his cabinet, in 1800, he tendered the position of Secretary of War to Marshall, who, however, declined it; but, Pickering being removed almost immediately afterward from the State Department, the portfolio of Secretary of State was offered to and accepted by Marshall. He discharged the duties of this office, very difficult, at the time, because of the jealousies existing between Great Britain and France, until the close of Mr. Adams' term. On the 31st of January he was appointed to the position of Chief Justice, and held the two offices from that time until March 4th.

The political career of Marshall had thus been one of great variety and activity. He had served in the State legislature, in the executive council of the State, in the State convention, in Congress, as a foreign minister, and in the cabinet. And, when not in office, he had given public expression to his views whenever the occasion demanded. Political differences at the time were very marked, and Marshall was a man of positive convictions and earnest in their expression. Such, however, was the charm of his personal manners, and the respect imposed

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by his absolute integrity, that he always enjoyed the esteem and friendship of his most pronounced political opponents. Partick Henry, George Mason and many others were outspoken in their cordial regard for him.

There was, however, one exception, and that was Thomas Jefferson. From the first, Jefferson was disposed to disparage Marshall by every means in his power. "His lax, lounging manners," he wrote to Madison, in 1795, "have made him popular with the bulk of the people of Richmond, and a profound hypocrisy with many thinking men of the country."

Henry, speaking of Marshall's conduct in the French embassy, said: "Tell Marshall I love him because he felt and acted as a Republican, as an American."

Jefferson in this same conduct could discern no patriotism, but only a shrewd and unscrupulous partisanship.

The candor which Henry experienced on all occasions seems to have made no impression on Jefferson. Even after he had retired from the Presidency, he wrote: "The judge's inveteracy is profound, and his mind of that gloomy malignity which will never let him forego the opportunity of satiating it on a victim." To Madison he wrote of "the rancorous hatred which Marshall bears to the government of his country," and of "the cunning and sophistry within which he is able to enshroud himself."

A strange sound these words have for us. Inveteracy and malignity are the last words to be applied to Marshall's disposition, as are cunning and sophistry to the habits of his mind.

While Marshall strongly distrusted Jefferson, I can find no evidence of a corresponding bitter personal feeling against him.

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Jefferson and Marshall recognized each other as rivals not indeed for position, but in what was, perhaps, of far greater consequence to them both: in the influence each was to exert in shaping the institutions of the country.

The Supreme Court met, for the first time, at Washington, on the first Monday in February, 1801. The reports do not show any cases argued or decisions rendered, at that term, and apparently the first act of Marshall in his office of Chief Justice was performed on the 4th day of March, 1801, when he administered the oath to Jefferson as President of the United States.

As they stood there face to face, these protagonists of American politics, each the strong and master mind of his school, they recognized the occasion as the beginning of a struggle in which there could be no compromise. On which side was the victory to be?

The issue between them was clearly drawn. On the one side the contention was that this government was a mere league or compact between sovereign States, on the other that it was a Nation of limited but of sovereign powers, framed by the people and competent to maintain, by force, if need be, its own integrity.

There lay before Marshall thirty-five years' tenure of the office of Chief Justice, with associates who, for nearly all of that time, entertained opinions in harmony with his own. The Federal party, to which he belonged, was, however, as an organization, absolutely discredited. It was never again, under that name, to wage a successful fight; it was never again, under that name, to elect a President.

Before Mr. Jefferson were eight years in the Presidential office, to be followed by eight years each of Madison and Monroe, who were in an especial sense his disciples

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and followers; and then, John Quincy Adams, four years, elected as a Republican, although at this time, when Marshall and Jefferson were confronting each other, he was recognized as a Federalist; then, eight years of Jackson and four of Van Buren. Altogether forty years of Democratic or, rather, as it was then called, Republican administration. Under these circumstances which would prevail?

There is no doubt that, if the powers of the Presidency from the beginning and throughout these forty years had been persistently and consistently exerted to counteract the views of the Constitution held by Marshall, and applied by him in the decision of cases coming before him, the struggle would have been an unequal one. The Supreme Court, without power or patronage, with no means of influence save the persuasive force of its opinions, would have been overborne in the contest. But the stars in their courses fought with Marshall. There was much truth in the statement of Jefferson's first inaugural: "We are all Republicans; we are all Federalists." The views men entertain of power are largely influenced by the consideration of who wields it. The authority, dangerous when intrusted to others, becomes salutary when exercised by ourselves. The powers of the Federal government and of the Presidential office were exerted to the extreme by Jefferson and his party. The seizure of the Batture in New Orleans, the act of non-importation, the embargo, and, above all, the acquisition of Louisiana, were radical measures and all opposed to the theories of Jefferson. In 1887 Cleveland had occasion to remark: "It is a condition which confronts us, not a theory." It is always so in the practical conduct of government. In the Louisiana matter Jefferson had

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a condition to deal with, and to it he sacrificed his constitutional theories. The acquisition of new territory was not mentioned in the Constitution, and if the National Government possessed only such powers as were expressly granted, the purchase was clearly illegal. He wrote to Breckenridge:

"The Executive in seizing the fugitive occurrence which so much advances the good of his country has done an act beyond the Constitution. The legislature in casting behind them metaphysical subtleties, and risking themselves, like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves, had they been in a position to do it."

He proposed then an amendment ratifying the unauthorized act, which would serve to "confirm and not weaken the Constitution, by more strongly marking out its lines." He discovered, however, that an amendment would not pass the Senate, and so wrote, six days later, that nothing must be said on the subject of the amendment, and that it was prudent "to do *sub silentio* what shall be found necessary." This mode of dealing manifestly far outruns the utmost latitude of construction, ignoring all limitations whatever, and justifies the government in doing whatever it assumes the majority of the people desire.

No question with respect to the acquisition of Louisiana ever came before the Supreme Court, but, many years after, the validity and effect of the treaty by which Florida was acquired were considered in Insurance Company *v.* Canter, and Marshall held that "the Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; con-

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sequently, that government possesses the power of acquiring territory, either by conquest or by treaty." But while the acts of the government were thus in conflict with the theories of those who administered it, the theories were not abandoned altogether, and the conflict continued.

One of the first acts of the Republicans, on coming into power, was the repeal of the new judiciary act and a re-enactment, or revival, of the old. The process of impeachment was also resorted to. The first case was against Pickering, a district judge of New Hampshire, who had from mental infirmity become unfitted for the duties of his office. The crimes and misdemeanors charged against him were clearly due to insanity; none the less, he was convicted.

A proceeding was then brought against Chase, but here the managers met with a vigorous resistance and an overwhelming defeat. An amendment to the Constitution was then proposed, authorizing the removal of a judge by the President on the address of both Houses; but nothing came of it, and this was the end of the direct attack upon the independence of the judiciary.

But the power of appointment remained with the executive, and through its use the judiciary might surely, albeit slowly, be brought into harmony with the other branches of government.

When Marshall came to the Bench, his associates were Cushing, Paterson, Chase, Washington and Moore. He survived them all, and also William Johnson, Brockholst Livingston, Thomas Todd and Robert Trimble, who came to the Bench after him. Altogether he had fifteen associates, representing appointments by every President from Washington to Jackson. The Bench was increased

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to seven, in 1807. The appointment to the additional place was made by Jefferson, who had also appointed Johnson and Livingston as successors to Moore and Paterson. During Madison's first term, Chase and Cushing died, and Duval and Story were appointed to succeed them. A majority of the court were thenceforth appointees of Jefferson, or his followers in office and doctrine. There remained of the original associates of Marshall only Bushrod Washington, who died in 1829. When Cushing died it was hailed as a godsend because of the opportunity it gave to defederalize the court. But, none the less, Marshall retained his ascendency almost to the last. And the very man appointed to succeed Cushing proved to be the ablest and most loyal coadjutor of Marshall on the bench. This was Joseph Story.

During Marshall's time, eleven hundred and six opinions were filed by the court, of which five hundred and nineteen were by him. He also filed eight dissenting opinions. The range of subjects covered is a very wide one, for the jurisdiction of the Federal courts over controversies between citizens of different States brought before them the entire realm of Anglo-Saxon jurisprudence. But it is in the field of constitutional law that Marshall stands pre-eminent. While he was on the bench the court rendered sixty-one constitutional decisions. In thirty-five of the cases the opinion of the court was by Marshall. In only one case, that of Ogden *v.* Saunders, was he in the minority.

One of the first cases was Marbury *v.* Madison, which has a twofold interest. It was the first clash between Jefferson and Marshall.

It is obvious that the opinions in the Bank and Cohens cases completely overthrew the Virginia and Kentucky

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resolutions, and firmly established the national character of our government. At this day the principles declared are accepted as fundamental, but at the time they were reprehended as revolutionary. The court was likened to a "subtle corps of sappers and miners, constantly working underground to undermine the foundations of our confederated fabric." To appreciate the value of Marshall's work we must bear in mind the conditions under which he wrought. The field of constitutional law was a new one.

In many of the cases not a single precedent is cited. Marshall was absolutely a pioneer, blazing out the way, with nothing but his reason to guide him. Something more than a lawyer was required. It was essential that the position of Chief Justice should be occupied by a statesman of large experience in practical affairs and possessed of great breadth of view. Beyond a doubt, it was of value to the Nation that Marshall had been a soldier in the war of the Revolution. His observation and experience of the insufficiency of the Articles of Confederation, the selfishness of the States, the force of local prejudice, had made a marked impression upon his mind. Even the great exigencies of the Revolution were scarcely sufficient to hold the States to the most meager performance of the duties which they owed each other, and it was manifest that, unless constrained by stronger bonds in times of peace, each would pursue its own immediate interests without regard to the requirements of the general welfare, and even without regard to what its own ultimate good demanded.

It was assumed always by the advocates of State sovereignty that theirs was the cause of individual rights and individual liberty, and that these priceless boons

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were threatened by the establishment of a strong National Government. To them the States were the especial guardians of civil liberty and the representative institutions of popular government. And yet, as Marshall saw, their especial dogma was founded in distrust of the people, that is, of all the people except those of their own particular locality. Experience had not shown to them, as it has to us, that free institutions may be strengthened by their extension, and that the final security of individual rights is to be found in the sense of justice of the many rather than of the few, and is better guaranteed by the Constitution of the United States than by that of an individual State.

Gibbons *v.* Ogden, decided in 1824, was the first of a long line of decisions, continued to our own day, of the greatest practical consequence, and undoubtedly carried the power of the General Government to an extent not apprehended by many of the framers. This was, however, not because of any perversion of the principles declared in the Constitution, but because of their application to conditions not dreamed of when the Constitution was framed. As a reward for the invention of the steamboat, the State of New York had given to Fulton and his associates a monopoly of the navigation of the Hudson river, and this monopoly had been sustained by the highest courts of the State, Chancellor Kent concurring in the decision. It was assailed as a violation of the authority of Congress to regulate commerce among the several States, and by the Supreme Court of the United States was held to be illegal. The power of Congress under the Constitution, Marshall held, was comprehensive and complete, and extended not only to traffic between the States, but to all the means and instrumentalities by

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which that traffic was carried on. The result of it was that not only the steamboats upon the rivers, but the railroads spanning the continent, the telegraph, the telephone — all the improved modes of transportation and communication devised by the inventive ingenuity of the century — were established as national in their character and subject to the control of the General Government. The steam-engine, in its application to manufactures and to transportation, more than any other agency, has contributed to the consolidation of the government and to making this union of States essentially a Nation; and it was well for the country that, until it had come into play as one of the forces of social and industrial life, there was a man like Marshall upon the Bench, who had prescience of its future needs, and who, not wanting faith in the people,— possessing that in as large degree as any of his opponents,— saw that the greater the number of the people, the greater the warrant for confidence reposed in them.

In 1829 Marshall was again called upon to serve his State, having been elected a member of the convention to frame a new Constitution, and his service here closed his distinctly political career. His influence in the convention was marked, and was exerted to secure a compromise of the radically conflicting views which at first prevailed.

During Jackson's administration there occurred another instance of the tendency of the party in power to apply Marshall's principles in practice, however much rejecting them in theory. In the case of the missionary, Worcester, in which the status of the Cherokee nation was involved, the Governor of Georgia refused to obey the mandate of the court, and the President, who was

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opposed to the views of the court, is reported to have said: "John Marshall has made the decision, now let him execute it." It was not to be long ere the President's authority was challenged, and then he became the energetic supporter of John Marshall's views. When he met the nullification ordinance of South Carolina with an unmistakable determination to enforce the laws of Congress in every State of the Union, he was simply giving effect to the views of government which Marshall had long and consistently declared. Justice Story attended a dinner given by the President at the time of the debate on the Force bill, and thought it worthy of remark that the President should specially invite him to drink a glass of wine with him. "But what is more remarkable," he says, "since his last proclamation and message the Chief Justice and myself have become his warmest supporters, and shall continue so just as long as he maintains the principles contained in them."

But the career of the Chief Justice was drawing to a close. He passed peacefully away, on the 6th day of July, 1835, retaining full possession of his intellectual faculties to the last and meeting the end with perfect composure.

In a manner his death was timely. The recent appointments to the Bench wrought a change in the views of the court, which, however, did not find expression until after his death, and he was spared the pain of finding himself in a minority in that august tribunal whose counsels he had guided so long, so wisely, and so well.

His work was done, and it was well done, and, whatever attempts might be made against it, would stand for all time. The exigencies of slavery were to bring his views for final determination to the arbitrament of

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civil war. That the prevailing forces should be on the side of union and freedom was due in large measure to his teaching; and to-day, as citizens of a country possessing a government adequate to the preservation of its integrity at home and its honor abroad, and to the security of its citizens in all their rights, we may forget the differences which separated the founders of our institutions, and recognize the good done by them all, and especially by that group of statesmen which Virginia contributed to the country: Patrick Henry, whose eloquence incited to revolt; Thomas Jefferson, whose masterly pen placed before the world in such impressive phrase the Declaration of Independence; Washington, whose unfaltering courage sustained the struggle to make that Declaration a fact; Madison, whose wisdom and moderation framed a Constitution which could reconcile the diverse opinions of the convention; and last, but not least, John Marshall, whose work as Chief Justice perfected and preserved for future generations the accomplishments and achievements of his compatriots.

A celebration was held in Sioux City, Iowa, by the Bar Association of that city, at a banquet held at the Mondamin Hotel. The minute entered on the records of the Association, quoted below, gives the details of the exercises:

"The second annual banquet of the Bar Association of Sioux City was held at the Mondamin Hotel in Sioux City, Iowa, February 4, 1901, in commemoration of John Marshall Day. After the banquet, a programme of toasts and responses was opened by the President, Mr. Craig L. Wright, who acted as toast-master. The toast, 'John

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Marshall, his Early Life and Military Service,' was responded to by Hon. George W. Wakefield. Mr. Leonard B. Robinson spoke on 'John Marshall, the Lawyer and Statesman,' and Mr. D. C. Shull on 'John Marshall, the Jurist.' Mr. Edwin J. Stason discussed 'John Marshall, the Man and Author,' and the exercises concluded with the singing of 'America' by the entire assemblage."

A celebration was also held at the Upper Iowa University, Fayette, Iowa, and an address delivered by Maurice Raymond Carter, of Bailey, before the faculty, students and citizens.

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STATE OF MISSOURI.

Appropriate proceedings to celebrate Marshall Day were had in the United States Circuit Court at St. Louis, in the State Circuit Court, and at the St. Louis Law School, concluding with a banquet at the Southern Hotel in the evening. The exercises were had under the auspices of the Bar Association of St. Louis, which appointed the following committee to arrange for the celebration: Amos M. Thayer, Elmer B. Adams, D. D. Fisher, Horatio D. Wood and Jacob Klein.[1]

Proceedings in United States Circuit Court.

Pursuant to the recommendations of the committee of the Bar Association of St. Louis, at the opening hour of the United States Circuit Court for the Eastern Division of the Eastern District of Missouri, sitting in St. Louis, February 4, 1901, there were present Henry C. Caldwell, Walter H. Sanborn and Amos M. Thayer, Circuit Judges of the Eighth Circuit (Judge Caldwell presiding), and Elmer B. Adams, United States District Judge. Henry S. Priest, former United States District Judge for the

[1] The proceedings were afterwards published by the Bar Association of St. Louis, embellished with an engraving of the Inman portrait of Marshall, under the following title: "'John Marshall Day' proceedings of the Bench and Bar of St. Louis. Celebrating the Centennial Anniversary of the Accession to the Supreme Court of the United States of Chief Justice John Marshall. February 4, 1801–1901. Published by the Bar Association of St. Louis."

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Eastern District of Missouri, having been designated to move an adjournment of the court in conformity with the recommendations of the committee, presented such motion and addressed the court in the following language:

Address of Henry S. Priest.

One hundred years ago to-day John Marshall of Virginia became Chief Justice of the Supreme Court of the United States. Considering the condition of the nation then, reviewing the events since, and, in the light of these, contemplating the possibilities of the future, and remembering what a potent influence he wielded in shaping its course, we should be constrained by feelings of unfeigned gratitude to venerate his memory and do honor to his name.

He will ever live in the hearts and affections of this great nation, an example of the most accomplished jurist and devoted patriot. He had served in many fields with distinction and with advantage to the public welfare before being called to preside as the chief magistrate of the Supreme Court, but it was in this office that his great genius found those profound questions of political and juridical philosophy that were worthy to engage its fullest capacity. Nature had given him an extraordinary mind, and by energetic study, research and contemplation he vastly improved upon the gifts of nature. His intellect was massive, clear and penetrative. It was disciplined to honest thought and courageous expression. He sought truth by all the methods of true philosophy, and worshiped as an idolater at the shrine of his country and his countrymen. Patriotism, with him, was not a mere rapturous sentiment, but a moral principle ever delight-

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ing him to do and advocate that which reason instructed him was the best for the happiness and prosperity of his country.

Marshall perceived in the Constitution an animated thing conceived to respond and capable of responding to the high purposes and ambitions of the people of the nation, and he made the Supreme Court its living voice. He discerned the "theoretical excellence of the government, the attainable prosperity and power of the States united, the magnificence of the national life which would spring from the Union, and the unbounded physical resources which stood ready to nourish its strength." In the spirit of these views he went forward expounding the Constitution, never transcending its letter or offending its spirit. Jefferson did not discover in it the power to acquire new territory by purchase, and determined to usurp it. Marshall demonstrated its existence and acquitted Jefferson's conduct of offense. He dared not usurp power — he did not shrink from duty.

In the grandeur of our united country, in the supremacy of law, in the harmony of governments which constitute the nation, and in a well regulated liberty, we discern the vindication of his courage and his penetrating genius.

For thirty-four years, with hostile executive and legislative departments, save an intermission of one administration, his masterful genius controlled and influenced the course of the judiciary. At the time he ascended the bench the court was without that prestige which its place in the trinity of governmental powers entitled it to enjoy. Its decisions had been few and not widely disseminated. Jay had just previously been offered the place for the second time. In declining the tender of ap-

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pointment, he said: "I left the bench perfectly convinced that under a system so defective it could not attain the energy, weight and dignity which were essential to its affording due support to the National Government."

It is said in Grecian mythology that all who consulted the oracle of Trophonius came away melancholy and depressed. Mr. Randolph spoke of the court as "the cave of Trophonius." Mr. Jefferson, long after his career as President, reflecting the sentiment of hostility towards the court which he always entertained, said: "The judiciary of the United States is a subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederate fabric."

Two years after Chief Justice Marshall's death an eminent lawyer, reviewing his life and services, said of the court: "How transcendent in power and dignity is this tribunal! It is the concentrated force of the whole Republic. There is nothing on earth like it. Its arms embrace the extremities of this vast empire; its voice is heard and obeyed in its remotest parts. Proud, powerful and sovereign States submit to its decrees, and the assembled representatives of sixteen millions of freemen may stand rebuked before it."

The years which have since passed have but confirmed of the court what was then said, and we cannot refrain from expressing the thought that this eloquent and truthful characterization is chiefly attributable to the services, talent, character and influence of Chief Justice Marshall. As a tribute to his memory, the most illustrious of all the great Chief Justices of the Supreme Court of the United States, I submit to your Honors a motion to adjourn for this day the several courts over which you preside.

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Response of Judge Amos M. Thayer, on behalf of the Court.

The members of this court share fully in those feelings of admiration and reverence for Chief Justice Marshall which have prompted the members of the legal profession throughout the United States to observe the one hundredth anniversary of his accession to the Supreme Bench with appropriate ceremonies.

The great Chief Justice has been dead for more than sixty-five years. The passions and prejudices evoked by heated political controversies which affected the judgment of some men during a portion of his active career, and possibly led to some false estimates of the man and his achievements, have now subsided. The great judicial and political structure, of which Chief Justice Marshall was one of the principal architects, is now in a state of completion. The Constitution of our country, as he understood and construed it, has been on trial for more than a century and has withstood the test of time, proving itself to be a shield against wrong and oppression, and, as he labored to make it, a source of national power fully adequate to meet all emergencies. The years that have elapsed since Marshall's death have given increased weight to all of his judicial utterances, and owing to our recent acquisition of new territory in a remote quarter of the globe, peopled by strange races, the lawyers and statesmen of our day are studying his decisions on constitutional questions with renewed interest, to discover, if they may, some casual thought or expression, hitherto unnoticed, to aid in the solution of some of the vexed problems which now confront us.

Looking backward from our present vantage ground to the conditions that existed one hundred years ago, all

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unprejudiced minds must concede that the appointment of Chief Justice Marshall to the Supreme Bench was one of those historic events whose influence on the national welfare was potent for good during the century that has just ended, and will remain potent so long as our present form of government is maintained. His appointment to office may have changed in a measure the scope and character of the organic act from which the United States as a nation derives its existence. So great were the prejudices that had been excited against the Federal Constitution, so little had been done prior to Marshall's accession to the Supreme Bench to develop its latent possibilities and to demonstrate its wholesome effect on the public welfare, and so loth were some of the States to relinquish any of their sovereign powers, that it is at least possible that if many another man of national prominence had been appointed in his place and stead, the Constitution might have been rendered valueless as a source of national power, or even wrecked on the shoals of ignorance, prejudice and disunion during the second decade of its existence. We should be profoundly grateful to President Adams that with a rare foresight, at a critical period of our history when the Constitution was in peril, he selected for the office of Chief Justice a lawyer and a statesman, who of all men of his generation was best qualified to pacify the public mind and inspire confidence in the organic act, without relinquishing by construction a single national power thereby conferred.

Chief Justice Marshall had learned as a soldier in the Continental Army, during the days of the Revolution, the weakness and the futility of a mere compact between sovereign States whose obligations each State was privileged to dispute or to dissolve at its pleasure. He had

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defended the Constitution on the floor of the Virginia Convention and before excited audiences against the assaults of such men as Patrick Henry, with an ability which was surpassed only by that of Hamilton and Madison. He had studied every line and paragraph of the organic act and had a theory of its operation and a prophetic vision of its effect on the national welfare which was the result of his own reflections and his intimate relations with such men as Washington, Hamilton and Madison. Moreover, as a statesman, Marshall possessed constructive ability of the highest order.

After the great Chief Justice took his seat on the Supreme Bench, that tribunal ceased to speak in timid, doubtful or hesitating tones upon any of the great questions relating to the powers of the General Government that were discussed at the Bar in quick succession during the early years of the last century after the anti-Federalists had gained the ascendency. The Chief Justice usually formulated the opinions of the court on such subjects, speaking always *ex cathedra*, as one who had "sounded the depth and shallows of every argument," and as one who, if not a member of the convention which had framed the Constitution, was nevertheless familiar with the thoughts and purposes of the great statesmen who had conceived it. For clearness of vision, breadth of view and power of logic, the decisions of Chief Justice Marshall relating to the Federal Constitution have never been excelled, and rarely, if ever, equaled. Under his masterful influence the Constitution of our country grew for more than a generation, along well-defined lines, into those fair proportions of symmetry and strength which the American people have long since learned to reverence and admire.

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No class of men understand so well as lawyers the extent to which legislative enactments, whether organic or otherwise, are affected by judicial interpretation. Statutes may be developed by a liberal construction, or emasculated by a narrow, strict and unfriendly interpretation. Bad laws usually lose a part of their power to do harm when they have undergone judicial scrutiny, and wise measures of legislation are frequently amplified and improved by the well-directed efforts of the Bar and Bench. Of the Federal Constitution as now understood, it may be said truthfully that it owes as much to the influence and genius of John Marshall as to the statesmanship of James Madison, who is supposed by some to have drafted it. Marshall was in thorough sympathy with those statesmen whose will had been most potent in framing the Constitution. He believed with them that "governments destitute of energy will ever produce anarchy;" that the new Nation should be armed with power to levy and collect its own taxes and imposts by its own officers; that it should be able to enforce its own laws by direct action on the individual; that it should have power to raise and maintain such military and naval forces as might be necessary to maintain peace at home and to prevent invasion from abroad; and that it should have sole authority to deal with other countries and with all subjects of national and international concern. In short, Marshall was in full accord with that class of statesmen who aimed to secure for the new government a proper degree of respect, both at home and abroad, and who desired to place it on a plane of entire equality with the other civilized nations of the earth as respects its power to maintain its own existence and to discharge functions that are purely national. Actuated by these beliefs and by

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these sentiments, Chief Justice Marshall read and interpreted the organic law with no disposition to stunt its growth or curb its influence, or to confine legislation by the National Assembly within narrow boundaries. From powers expressly conferred on the General Government he deduced others which he deemed conducive to the public welfare, by liberal inferences. And yet I think it may be said, without departing from the truth, that in the whole course of his judicial career he never upheld the exercise of a power by the Federal Government unless a warrant for its exercise could be found in a rational and fair interpretation of the provisions of the Federal Constitution.

By political affiliation Marshall was a pronounced Federalist, but the present generation of lawyers will generally agree, and such will be the verdict of the future, that party prejudice never clouded his vision or distorted his judgment as a jurist. As we read his greatest opinions on questions of constitutional law our judgments yield readily to the vigor of his thought and the weight of his reasons. Indeed, we wonder at times how the conclusion that is reached could ever have been challenged by unprejudiced minds. Although he was a Federalist, yet he did not belong to that class of Federalists, of whom there may have been a few, who distrusted the honesty and intelligence of the common people and for that reason were more anxious to establish an oligarchy than to found a republic. His love of freedom and his desire to found a government whereby equal and adequate civil rights should be secured to all men by proper constitutional guaranties were as strong and ardent as those men could have desired who were most at variance with his political views. He differed with Patrick Henry and

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Jefferson and other men of that school only as to the means whereby liberty could be preserved with the least danger of degenerating into anarchy.

Marshall's accurate knowledge of the wants of the people and the necessities of the times in which he lived, no less than his clear comprehension of the legitimate functions of government, fitted him to achieve distinction as a legislator no less than as a jurist. By common report he was not a great orator, but he possessed ability in a marked degree to influence the judgments of men, as well as the capacity to formulate wise measures of national policy when the times were critical, and if his talents had been given opportunity for full development in this field of action he would have taken rank with our ablest statesmen and left an indelible impress on Federal legislation. Fortunately, however, he was appointed to the Supreme Bench at an early period of our history, when the Constitution of the United States was in a formative condition, and his fame rests, and will continue to rest, on the inestimable service which he rendered his country as the first great interpreter of its organic law.

The American people of all classes and professions owe him a debt of gratitude, the extent of which some persons, perhaps, do not fully realize; but as lawyers and judges we are more deeply sensible of the national obligation to the great Chief Justice because he was of our profession and because we have more frequent occasion to observe the wide reach and the controlling effect of his influence. By common consent the legal fraternity have long since elevated Chief Justice Marshall to a plane of equality with the greatest of Anglo-Saxon judges.

It is a pleasure, therefore, no less than a duty on this the first centennial anniversary of his accession to the

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Supreme Bench, to join with the Bar in paying renewed tribute to his worth and genius. It will accordingly be ordered that the remarks made at the Bar be spread upon the records of this court, and that all the Federal courts in this city, represented by the judges who are now present, stand adjourned for the day out of respect for his memory and in commemoration of his great services to the Nation.

Proceedings of the Circuit Court, City of St. Louis.

In accordance with the committee's recommendation, the Judges of the Circuit Court, City of St. Louis, met in Court Room No. 4, in the Court House in said city. All the Judges of the Court were present: Warwick Hough, presiding; Selden P. Spencer, John O'Neill Ryan, William Zachritz, Daniel D. Fisher, Walter B. Douglas, John A. Talty, Horatio D. Wood and Franklin Ferriss. Sitting with the Judges of the Court, by invitation, were the Hons. Charles C. Bland, R. L. Goode and Henry W. Bond, Judges of the St. Louis Court of Appeals. The motion to adjourn the courts in commemoration of the one hundredth anniversary of the accession of Chief Justice Marshall was made by the Hon. Jacob Klein, former Judge of the Circuit Court, who, in support of the motion, spoke in part as follows:

Address of Jacob Klein.

May it please your Honors:

This is the one hundredth anniversary of an event which was at the time, has ever since remained, and will forever continue memorable in the annals of our people

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and our country, and especially in the annals of our judiciary. To-day, one hundred years ago, John Marshall took his seat and assumed the office of Chief Justice of the Supreme Court of the United States. He filled that dignified and exalted position with matchless ability, unassuming urbanity, rigid and unflinching courage and integrity, and a wonderful serenity of temper until the final summons came, and the full record of his long and useful life was closed on July 6, 1835.

When the great Chief Justice took his seat as a member of that august and revered tribunal, there sat with him as Associate Justices, William Cushing, of Massachusetts; William Paterson, of New Jersey; Samuel Chase, of Maryland; Bushrod Washington, of Virginia, and Alfred Moore, of North Carolina. During the long period of his service other distinguished jurists occupied the Bench with him. There were William Johnson, of South Carolina; Brockholst Livingston, of New York; Thomas Todd, of Kentucky; Gabriel Duvall, of Maryland; Joseph Story, of Massachusetts; Smith Thompson, of New York; Robert Trimble, of Virginia; John McLean, of Ohio; Henry Baldwin, of Pennsylvania, and James M. Wayne, of Georgia. This is, indeed, a grand galaxy. These men were themselves masters in the law, and a lesser light than Marshall would have been dimmed, if not entirely obscured, by the strength and glory of these associates. As it was, however, they but served to bring into bolder and firmer relief the strong figure of this moral and intellectual prince of men, and to set off his massive intellectual and moral proportions.

Presiding in the court he seemed to be the very embodiment of justice and of law. In his opinions the strength and accuracy of his mental operations are every-

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where visible, and his logic, laid bare in terse, simple and cogent language, leads irresistibly to the conclusions announced in his judgments. To him the law was the perfection of reason and the exponent of the wisdom and moral sense of man; and the sentiment expressed by Bishop Hooker, that "of law no less can be acknowledged than that her seat is in the bosom of God, her voice the harmony of the world; that all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power," was to him a reality.

When Marshall became Chief Justice, many earnest and patriotic men considered the Constitution of the United States as tentative; as a mere experiment to form a government based upon the idea of the political equality of the governed. To Marshall it was not an experiment. Under his strong and plastic hand, under his sincere faith and trust in the wisdom of that instrument, the Constitution was found sufficient for every emergency as it arose.

In the consideration and disposition of causes Chief Justice Marshall had constantly in mind that the law and its remedies cannot stand still, but must undergo an incessant evolution and development, and that in the administration of justice it is the duty of all courts to adapt themselves, as far as possible, in their practice and course of procedure, to the existing state of society so as to meet all those new cases which from the progress daily made in the affairs of men must continually arise. To him justice was the supreme interest of the human race, the interest upon which the whole fabric of human society depended. The temple of justice was to him the abiding place of the Ark of the Covenant with God. He

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was indeed a high priest in that temple; and he upheld its dignity and ministered at its altar with zeal and fortitude for over thirty-four years.

We are accustomed to hear the names of Washington, Adams and Jefferson as the great triumvirate of our Revolutionary period. No one would question that Washington was the consummate flower of our early American civilization. But as the years roll on, and the halo surrounding those heroic names becomes still brighter, the name of John Marshall will shine, in the clear blue where the names of our heroes are written in sunlight, with a luster as clear and as bright as that of any patriot, soldier, statesman or jurist of our country.

In behalf of a grateful people, and in behalf of the Bar of our city, I present to your Honors this motion, and request that you will order an adjournment of the courts to honor the memory of the great Chief Justice, and to commemorate the one hundredth anniversary of his inauguration into that office.

Response of Judge Warwick Hough, in behalf of the Court.

Before yielding to the request for adjournment which has been so felicitously presented, a few words on behalf of the court may not be inappropriate.

Certainly no more interesting spectacle, in connection with secular affairs, can be presented for the contemplation of mankind, than that of the entire body of the ministers of the law, in a widely extended country like this, simultaneously assembling in their respective jurisdictions and voluntarily suspending for a day the exercise of their professional functions, in honor of "The Great Chief Justice"— whose name, as said soon after

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his death, by Mr. Justice Story in his opinion in Briscoe *v.* The Bank, is "never to be pronounced without reverence."

At the first session of the Supreme Court of the United States, which was held in the City of Washington one hundred years ago to-day, John Marshall sat as Chief Justice for the first time. Henceforth this day will doubtless be consecrated to the memory of that illustrious magistrate, until, in the course of time, through its continuous observance, even the general student of our country's history will become familiar, not only with his spotless life and splendid services, but also with those luminous judgments expounding the Constitution, which themselves have become a part of the fundamental law of the land. It has been said of him that "he was born to be the Chief Justice of any country in which Providence should have cast him."

From the time of his death to the present, on numerous public occasions, lawyers and judges, orators and statesmen, all of the most exalted abilities, not least among whom is a distinguished member of our own bar,[1] have, with affectionate veneration, exhausted the whole vocabulary of eulogy in a vain endeavor adequately to portray his supreme moral excellence, his intellectual greatness, the charm and graces of his personal character and the inestimable value of his public services; and the most gifted, perhaps, of all his contemporaries and associates and eulogists has in accents of despair declared that he was unable to find language sufficiently expressive of his admiration and reverence of his transcendent genius.

Succeeding generations have linked his name with those of Nottingham, Hardwicke, Mansfield and Stowell. Like

[1] Hon. Henry Hitchcock.

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them, he occupied an original field of judicial labor, and by the exercise of his wonderful analytical and synthetical powers of mind in the department of constitutional law, he may be said, like them, to have created a system of jurisprudence.

The influence of his judgments will continue to be felt as long as written constitutions are employed among men as the basis of civil government; and of the great magistrate himself, it may more appropriately be said than of him of whom it was said, that "when thrones are crumbled and dynasties forgotten, he will stand the landmark of his country's genius, a mental pyramid in the solitude of time, beneath whose shade things may moulder, and round whose summit eternity must play."

Proceedings at the St. Louis Law School.

On the morning of February 4th a meeting was held by the faculty and the students of the St. Louis Law School for the purpose of hearing an address by the Hon. Henry Hitchcock, of the St. Louis Bar, appropriate to the occasion. The address of Mr. Hitchcock, omitting the biographical portions, is given below:

Address of Henry Hitchcock.

We are assembled this morning in order that the St. Louis Law School may bear its part in celebrating the Centennial Anniversary of the installation of John Marshall as Chief Justice of the Supreme Court of the United States on the 4th day of February, 1801.

The Address of the National Committee of the American Bar Association to the Bench and Bar of the United States, proposing the national commemoration of that

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event, met with universal and cordial response. Throughout the Union, Federal and State courts and State and local Bar Associations observe this day with fitting ceremonies in honor of the great Chief Justice. The President of the United States, in his annual message in December last, commended the subject to Congress, and at the National Capital an eminent member of our profession, formerly Attorney-General of the United States, is appointed to deliver an appropriate oration before the two Houses of Congress, the Chief Justice of the Supreme Court presiding.

It was further recommended by the American Bar Association, through its National Committee, that similar ceremonies be held in all American Colleges, Law Schools and Public Schools, to the end that the youth of our country may be made more fully acquainted with Marshall's noble life and distinguished services. I respond with especial pleasure to the invitation of the faculty of this Law School to contribute to that most worthy end—by no means attempting to fitly eulogize that great man, but only making such brief mention as the limited time at our command permits, of some of the more conspicuous incidents of his life and of the more important of his great services. If history, as has been said, is philosophy teaching by example, still more vivid and impressive are the lessons of a noble life. Nor is it too much to say, that among all the illustrious men whose names adorn the annals of ancient or of modern jurisprudence, there is not one whose life offers to the student a loftier example of private virtue and disinterested public service, nor one which affords a parallel to the splendor of his judicial career.

No complete or satisfactory biography of Chief Justice

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Marshall has been published. The incidents of his life must be gathered from such sources as Flanders' Lives of the Chief Justices, and the similar work by Van Santvoord, Hampton L. Carson's admirable history of the Supreme Court, various public orations in his honor and other less elaborate notices, a bibliography of which is given in the small pamphlet published by the Illinois State Bar Association in connection with this celebration. The most important of the public addresses there mentioned are those delivered in 1835, shortly after Marshall's death, one by Horace Binney in Philadelphia, another in Boston by Mr. Justice Story, for twenty-four years the associate and intimate friend of Marshall, and the eulogy by William Henry Rawle in May, 1884, in Washington City, at the unveiling of the statue of Marshall, erected by the Bar and the Congress of the United States. To these I am largely indebted for the biographical portions of this sketch. . . .

With such preparation, John Marshall, at the age of forty-six, entered upon a judicial career to which, I confidently repeat, no other in history affords a parallel. On the 31st day of January, 1801, his nomination by President Adams to the Senate having been unanimously confirmed, he was commissioned Chief Justice of the Supreme Court of the United States, and took his seat on the 4th of February following. On that day the Supreme Court first met at the city of Washington as the seat of the National Government.

"The court," said Chief Justice Waite in his brief address at the unveiling of the Marshall statue, "had then been in existence but eleven years, and in that time less than one hundred cases had passed under its judgment. In short, the Nation, the Constitution and the laws were

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in their infancy. Under these circumstances, it was most fortunate for the country that the great Chief Justice retained his high position for thirty-four years, and that during all that time, with scarcely any interruption, he kept on with the work he showed himself so competent to perform. He kept always at the front on all questions of constitutional law, and consequently his master hand is seen in every case which involved that subject. Hardly a day now passes in the court he so dignified and adorned without reference to some decision of his time establishing a principle which, from that day to this, has been accepted as undoubted law."

I may add that in the recent argument of the Porto Rico cases in the Supreme Court, involving constitutional questions of the highest moment, among the decisions cited on either side, the two on which, perhaps, the most stress has been laid are American Ins. Co. *v.* Canter and Loughborough *v.* Blake, both decided by Chief Justice Marshall.

The Supreme Court reports show how large was the share of the great Chief Justice in the labors of those thirty-four years. During that period 1,215 cases are reported, in 1,106 of which opinions were filed. In 519 of these Marshall delivered the opinion of the court, the remainder being unequally divided among the fifteen judges who were from time to time his associates. From the organization of the court in 1790 until Marshall's appointment in 1801, only six decisions were rendered involving questions of constitutional law. From 1801 to 1835, sixty-two such decisions were given, in thirty-six of which the opinion of the court was written by Marshall, and in the remaining twenty-six by some one of seven other judges. These details illustrate the relation which

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the Chief Justice bore to his associates. It is not strange, in view of his acknowledged intellectual supremacy, his exalted reputation and his singularly winning personal traits, that the history of his labors during that period should be to so large an extent the history of the Supreme Court itself.

The work of that court cannot be justly estimated, nor can Marshall's part in it, without taking into account the unexampled conditions under which it was performed. Justice Story, in his eulogy, speaks of "those exquisite judgments, the fruits of his own unassisted meditations, from which the court has received so much honor." Chief Justice Waite, at the unveiling of the Marshall statue, quoting this phrase, added, "I have sometimes thought even the bar of the country hardly realizes to what extent he was, in some respects, unassisted."

Consider how much is implied in Chief Justice Waite's words — "The Nation, the Constitution and the laws were in their infancy." Not only were there absolutely no precedents to guide the court in what Story calls "the gigantic task of expounding the Constitution," but a completely novel and momentous problem of political science was to be solved — whether it was possible to successfully work a scheme contemplating the contemporaneous supremacy, in each of thirteen independent commonwealths, of two governments, the Nation and the State, distinct and separate in their action, yet commanding with equal authority the obedience of the same people, so that each in its allotted sphere should perform its functions without impediment to or collision with the other? Patrick Henry, in the Virginia convention, declared it insoluble, denouncing what he called "those two co-ordinate, interfering, unlimited powers of harass-

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ing the community," as "unexampled, unprecedented in history, the visionary projects of modern politicians" and "a political solecism." For us, that problem is so completely solved by the experience of a century, that few Americans realize what Professor Bryce, in his masterly work, *The American Commonwealth*, calls "that immense complexity which startles and at first bewilders a student of American institutions." Its solution depended, in part, upon the interpretation and enforcement of a written constitution, which, as Mr. Webster said in his argument, and Marshall repeated in his decision in Gibbons *v.* Ogden, enumerated but did not define the powers which it created. And thus that scheme assigned to the Supreme Court, as a co-ordinate department of the National Government, a part never before undertaken by any tribunal.

This occasion does not permit even an enumeration of the great judgments upon which Marshall's fame securely rests. May I, in conclusion, briefly call your attention to one or two of them, as illustrating the intuitive grasp of principles, the extraordinary clearness and power of statement, and the unanswerable logic, which justify that terse and striking comment of Mr. Rawle, in his admirable address at the unveiling of the statue —

"It may be doubted whether, great as is his reputation, full justice has yet been done him. In his interpretation of the law, the premises seem so undeniable, the reasoning so logical, the conclusion so irresistible, that men are wont to wonder that there had ever been any question at all."

Nothing could better describe Marshall's opinion in the celebrated case of Marbury *v.* Madison, brought to the December term, 1801, reported in 1 Cranch. That

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case involved a constitutional question of the very highest importance. Marbury filed his petition, invoking the original jurisdiction conferred upon the court by the terms of the Judiciary Act, for a writ of *mandamus* requiring the Secretary of State to deliver to him a commission as justice of the peace, which had been signed by President Adams but had not been delivered when Mr. Jefferson became President. The Constitution conferred no such jurisdiction. The question was whether an act of Congress could confer it,—and if not, whether the Supreme Court had power to declare such an act void, because not warranted by the Constitution. . . .

The decision in this case was the first authoritative announcement by the Supreme Court of its right to declare and enforce the limits placed by the Constitution upon the legislative power. The question was not new. The same principle had been asserted by the Superior Court of Rhode Island in 1786, in Trevett *v.* Weedon, and by Alexander Hamilton in *The Federalist*, and by Marshall himself in the Virginia Convention in 1788. But in Marbury *v.* Madison the doctrine was established once for all, beyond further question or argument.

The efficiency of the judicial power under the Constitution being thus demonstrated, what was its extent? To what cases or controversies did it apply? What jurisdiction was conferred upon the Federal courts under the Constitution and the laws made in pursuance thereof; especially touching matters with which the State governments were or might be concerned?

It was inevitable that the extreme advocates of State rights should try conclusions with the national authority as administered in the Federal courts. This was attempted, now by State enactments in disregard of their

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decisions, and again by the refusal of State courts to acknowledge the supervisory power of the Supreme Court.

The first collision grew out of a legacy from the feeble days before the Constitution, the prize case of The Sloop Active, condemned in 1777 by the Pennsylvania Admiralty Court. Its decision was reversed by the Committee of Appeals in the Continental Congress in 1778, but their decision was contemptuously ignored by the State authorities. The controversy was reopened in 1808, in United States *v.* Peters, decided by Marshall, reported in 5 Cranch, to which, supplemented by the historian Hildreth's interesting account of the enforcement against the State authorities of a peremptory writ of *mandamus* issued by the Supreme Court, I must refer you.

Another phase of the States' rights controversy was presented when the Virginia Court of Appeals, in 1814, denied the jurisdiction and refused to obey the mandate of the Supreme Court in the case of Martin *v.* Hunter's Lessee, involving the validity of a land title protected by a treaty. On a second writ of error argued in 1816, the Supreme Court affirmed its jurisdiction in a masterly judgment by Mr. Justice Story, but avoided further controversy with the Court of Appeals by declaring void the judgment of that court and valid that of the inferior Virginia court in favor of the title.

But this vital question was again presented in 1821, in the great case of Cohens *v.* Virginia, reported in 6 Wheaton. The opinion of the Supreme Court was delivered by the Chief Justice, and his fame might well rest on that magnificent argument alone.

The Cohens, plaintiffs in error, were indicted in the Sessions Court of Norfolk for selling lottery tickets in Virginia contrary to a State statute. Their defense, that

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the lottery was established and the tickets issued by the City of Washington, under its charter granted by Congress, was overruled, and they were fined one hundred dollars; from which judgment, the Sessions Court being the highest State court having jurisdiction of the case, they sued out a writ of error from the Supreme Court of the United States. The State of Virginia made it a test case, being represented by eminent counsel, who made, and elaborately argued, a motion to dismiss the writ for want of jurisdiction. This motion the court unanimously overruled, Marshall's opinion filling nearly sixty printed pages, of compact and powerful argument, based upon an analysis of the Constitution, without citing a single authority. Its opening paragraph is an impressive example of his extraordinary power of terse and luminous statement, and his method of laying bare a fallacy by reducing it to its simplest terms.

After stating the case and the points presented for the State, the Chief Justice proceeds:

"The questions presented to the court by the first two points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review, and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made by a part against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the

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Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every State in the Union. That the Constitution, laws and treaties may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

"If such be the Constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of this court to say so, and to perform that task which the American people have assigned to the judicial department."

Distinguishing the two great classes of jurisdiction under the Constitution, one arising from the character of the parties, the other depending on the nature of the controversy without regard to the parties, and comprehending "all cases in law and equity arising under the Constitution, laws and treaties of the United States;" and quoting the provision that

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding;" he continues —

"This is the authoritative language of the American people; *and, if gentlemen please, of the American States.* It marks with lines too strong to be mistaken the characteristic distinction between the government of the Union

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and those of the States. The General Government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority."

Thus, in a single phrase, he laid bare the pith and kernel of the controversy, or rather of a question no longer open to judicial controversy. That flash of grave and delicate irony,—"*and, if gentlemen please, of the American States*," was it a reminiscence of the great debate in the Virginia Convention, thirty-three years before?—when Patrick Henry, speaking of the framers of the Constitution, passionately demanded,—

"Who authorized them to speak the language of *We, the people*, instead of *We, the States?* States are the characteristics and the soul of a confederacy. If the States be not the agents of this compact, it must be *one great consolidated national government of the people of all the States.*"

The counsel for Virginia relied much on the Eleventh Amendment. But the Chief Justice replied that this was not a *suit against the State*, but a prosecution by the State, to which a defense under the laws of the United States was set up; and that the writ of error merely removed the record into the supervising tribunal, in pursuance of Cohens' constitutional right to have their defense re-examined there.

But, it was argued, the supervisory jurisdiction claimed for the Supreme Court is not needed, and could not have been intended. Are not the State legislatures and the State courts bound by solemn oath to support the Constitution? It would be most "unjust and injurious" to suppose them capable of perjury. Even if that supposition could be entertained, such a jurisdiction would be

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altogether inadequate. Whenever the States shall be determined to destroy the Federal Government, they can quietly and effectually accomplish the purpose *by not acting*. The legislatures need only to refuse to appoint Senators and Presidential electors, and then, said the counsel for Virginia, "the executive department, and part of the legislative, ceases to exist, and the Federal Government thus perishes by a sin of omission, not of commission."

Thus boldly were foreshadowed the revolutionary tactics of the secessionist leaders in February, 1861. In the fierce light of those later days, the reply of the Chief Justice reads like a prophecy. Admitting that such extreme cases might occur,—

"We cannot help believing," he said, "that a general conviction of the total incapacity of the Government to protect itself and its laws in such cases would contribute in no inconsiderable degree to their occurrence."

How that warning recalls to us President Buchanan's despairing message of December 3, 1860! On one page a laborious argument for the perpetuity of the Union under the Constitution, on the next the humiliating conclusion that although "its framers never intended to plant in its bosom the seeds of its own dissolution," yet they had failed to delegate to the Executive or to Congress the power to coerce a single seceding or rebellious State! Compare with this the noble and inspiring words of the great Chief Justice:

"A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed if they have

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not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. . . . It is very true that whenever hostility to the existing system shall become universal it will also be irresistible. The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it *is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.* . . . The framers of the Constitution were indeed unable to make any provisions which should protect that instrument against a general combination of the States, or of the people, for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State, whose tendency might be to arrest the execution of the laws; and this it was the part of true wisdom to attempt. *We think they have attempted it.*"

So thought the people of the United States in 1861. Upon the very lines laid down by Marshall, their supreme and irresistible power repelled, for the preservation of the whole, the usurpation attempted by a part. Once for all, the pernicious heresies of secession and State sovereignty were rejected and cast out. But the successors of Marshall still firmly maintain that sound and wholesome theory of State rights, by which the supremacy of the Nation and the autonomy of the States, each in its own sphere, are alike recognized as essential to our complex system of government. That doctrine

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has perhaps never been more forcibly stated than in the well-known language of Chief Justice Chase in Texas *v.* White (7 Wallace), decided in 1868:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

I would gladly, if time permitted, call your attention to others of those great judgments in which the Constitution was expounded and the respective powers of the Nation and the State defined with marvelous force and clearness. Such were the decisions in United States *v.* Fisher (2 Cranch), in 1804, and the great case of M'Culloch *v.* Maryland (4 Wheaton), in 1819, by which, among other things, was established the power of Congress to select any appropriate means for attaining any legitimate end within the scope of the Constitution; in the celebrated case of Gibbons *v.* Ogden (9 Wheaton), in 1824, interpreting the "Commerce Clause" of the Constitution, admiringly cited by Chancellor Kent in his Commentaries, and upon whose solid foundation rest many subsequent decisions of the highest importance; in Fletcher *v.* Peck (6 Cranch), in 1810, New Jersey *v.* Wilson (7 Cranch), in 1812, Sturges *v.* Crowninshield (4 Wheaton), in 1819, and the still more celebrated case of Dartmouth College *v.* Woodward (4 Wheaton), in 1819, by which was upheld the sanctity of contracts; in American Insurance Co. *v.*

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Canter (1 Peters), in 1828, which in one terse sentence made clear, beyond question, the constitutional power of the government to acquire territory either by conquest or by treaty — a power which Jefferson himself doubted even when he made the Louisiana purchase. Not less characteristic was the splendid courage exhibited by Marshall when Aaron Burr was tried before him for treason, in the United States Circuit Court at Richmond, in 1807. In language whose dignity scarcely veiled his deep feeling, he calmly met the responsibility of a decision by which, as angry partisans bitterly declared, "Marshall stepped in between Burr and death."

The great influence which Marshall's intellectual power commanded was enhanced by his singularly winning personal traits. It is said that he never had a quarrel or an enemy. Friends and political opponents alike bear witness to the perfect purity of his life, his absolute integrity, his simple and genial manners, the gentle dignity of his bearing and the sweetness and serenity of his temper. His demeanor on the bench was a model of judicial dignity, courtesy and patience; and the popularity which was remarkable even in his youth, became in later years an exalted and affectionate veneration, which his associates shared with the Bar and the people at large. This was touchingly exhibited in the Virginia Convention which met in 1829 to frame a new State Constitution; of which Marshall, Madison and Monroe were members. Marshall was then in his seventy-fifth year, but a contemporary describes him as having "a face of genius and an eye of fire." His speeches, infrequent and brief, but always clear and powerful, were listened to with the most eager and respectful attention, and any dissent from

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his opinions was almost invariably accompanied by some expression of veneration for his character and affectionate attachment for his person. Still later, an English traveler of note, who met him in Washington, dwells with enthusiasm upon the simple dignity of the "tall, majestic, bright-eyed old man;" while another describes his countenance as indicating that simplicity of mind and benignity which so eminently distinguished his character, and the venerable dignity of his appearance as comparing favorably with that of the most distinguished-looking peer in the British House of Lords.

Upon his death, in July, 1835, fitting expression was given to the veneration in which the great jurist was held by the Bench and Bar of the Union.

Marshall was still Chief Justice in 1831, when De Tocqueville, after a profound study of American institutions, wrote thus of the Supreme Court:

"When we have successively examined in detail the organization of the Supreme Court, and the entire prerogatives which it exercises, we shall readily admit that a more imposing judicial power was never constituted by any people. The Supreme Court is placed at the head of all known tribunals, both by the nature of its rights and the class of justiciable parties which it controls."

More than sixty years later Lord Coleridge, then Lord Chief Justice of England, in a letter to an American friend, referring to Chief Justice Marshall, wrote thus:

"You do honor to yourselves in honoring so noble a specimen of the lawyer and the judge. The Supreme Court is unique; and the part it has played in the orderly and law-abiding development of your country can hardly be overstated. Our greatest courts and judges have been great almost in proportion to their careful absti-

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nence from politics — I do not mean partisan politics (that is a matter of course), but from politics in the large and wider sense. With you it is necessarily different, and the extraordinary sagacity and firmness with which your Supreme Court has wielded its unparalleled powers is a thing for you to thank God for and for us foreigners to envy and admire."

Banquet at the Southern Hotel.

The imposing ceremonies of the day ended with a banquet in the evening at the Southern Hotel. "Never perhaps before," says the official report of the proceedings on Marshall day in St. Louis, "had there assembled at this famous hostelry around the banquet table a more brilliant and widely known group of men. As one glanced around the banquet hall the scene was indeed inspiring. The room was most artistically draped with the national colors intermingled with the more sombre hues of colonial days. In front of the presiding officer was a life-sized etching from the celebrated portrait of the Chief Justice, painted by Inman about 1831, whilst over the presiding officer's seat hung a portrait painted five years prior to Marshall's death, by Chester Harding. The bar was thus enabled to look upon the pictured impress of their greatest judge as he appeared towards the end of his illustrious career. To add to the effect a band of music rendered choice selections during the hour, and the florists had with skilful hands transformed the room into a veritable flower garden. At the head table sat the Hon. James Hagerman, President of the Bar Association, whilst on either side were Judges Caldwell, Thayer and Sanborn of the United

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States Circuit Court of Appeals, Hon. E. B. Adams, United States District Judge, Hon. Leroy B. Valliant of the Supreme Court of Missouri, Hon. H. W. Bond of the St. Louis Court of Appeals, Judges Wood, Douglas, Fisher and Spencer of the Circuit Court of the city of St. Louis, Hon. John W. Noble, ex-Secretary of the Interior, James L. Blair and Henry T. Kent. At smaller tables conveniently grouped sat the leading representatives of the St. Louis Bar whose achievements had added honor to the profession."

President Hagerman spoke in part as follows: [1]

President Hagerman's Address.

Before I introduce to you the illusive and delusive feature of this festal occasion, now and hereafter to be known as the President's Address, permit me a word as to the origin of the imposing ceremonies which were held in our courts and schools to-day and which we are to conclude to-night under these flags (Continental and American), surrounded by this wilderness of flowers, amid the flow of wine and eloquence and song, with the august features of Chief Justice Marshall looking down from these portraits and up from this programme.

The celebration of this day will tend to augment and perpetuate Marshall's fame; it should not diminish that of Jefferson. It must be remembered that Jefferson's criticism of Marshall and the Supreme Court did not apply to the decisions between individuals involving questions of private rights or those between the Federal Government and the citizens. The controversy between Jeffer-

[1] The Editor regrets that want of space has compelled the curtailment of the addresses of the speakers at the dinner.

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son and Marshall was more vital. It raged around the question as to who was the ultimate arbiter between the Federal Government and its co-ordinate departments and between them and the States.

Marshall stood for the powers of the Federal Government and the Federal judiciary. Where the Federal Government had power he asserted its supremacy, and he held that the Supreme Court could not only set aside acts of the State but pronounce void acts of the Federal Executive and of Congress.

In my view of Marshall the most striking of his attributes are his dominating character and overwhelming influence and determined purpose.

Justice Story said that Marshall had the tenderest heart of any man he ever knew, and a lineal descendant of the Chief Justice has left on record that "he never retired without kneeling at his bed-side and repeating the little prayer, 'I pray the Lord my soul to keep,'" which had been taught him at his mother's knee when he first began to lisp.

Webster with his peroration in the Dartmouth College case, pleading for his *alma mater* and against her enemies, drew tears from the eyes of the Chief Justice; so we of the Bar know that he was not an adamantine judge, and for that reason, in addition to others, we love and revere him.

Marshall's was not an unconvivial nature. If he is permitted to look down upon us no doubt he approves this scene.

He was accustomed to boast that in his cellar was "the best Madeira" in all Virginia, though his rule was to take it only on rainy days. Once entertaining friends he asked them to join him in his favorite glass. It was a royal

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sunshiny day, not a cloud as large as a speck could be seen. When reminded that he was about to violate his own rule, instantly and true to the dominant instinct of his life, he ruled that the dominions of his jurisdiction were so wide that it was certainly raining somewhere within them.

The first course of the evening is "The political conditions in the United States as they existed at the commencement of Marshall's judicial career." Dangerous as it is, we are to be addressed on this subject by a Virginian, Mr. H. T. Kent, who has a pardonable pride that his native State contributed the great Chief Justice, but we shall have to warn him that Virginia's offering to the Union became afterwards the pride of the whole country. Then in orderly succession will "Marshall's services as a soldier, diplomat and statesman" be treated by Mr. James L. Blair, the son of a distinguished soldier and statesman and himself a diplomat of high degree, aye, a statesman, too, who, with pen and voice, has made himself a potent factor in the life of our city.

Before the hymn and the benediction we shall be told of "Marshall's services as a jurist" by a son of New England, Judge E. B. Adams, who a few years ago left Vermont, which was not one of the original States forming the Constitution, and broke into the front ranks of our bar, then into the State bench and later into the Federal bench, as his native State broke into the Union, knowing it a good place to be. New England appointed Marshall and has always asserted a kind of exclusive claim to him which we of other lineage dispute. I warn this puritan Vermonter as I warned the cavalier Virginian, to avoid provincialisms.

I have the pleasure now of introducing Mr. Henry T.

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Kent, who will address you on the topic already mentioned.

Mr. Kent's interesting review of the contemporary political conditions of the United States as they existed at the commencement of Marshall's career concluded as follows:

Address of Henry T. Kent.

Betwixt these two extremes, occupying a middle ground, there was a conservative school headed by Washington. They were the warm friends of popular government, but they demanded something more potential than a "mummy clad in robes of state." Their ideas resulted from practical experience. They had seen the old confederation bound together by a rope of sand. They had seen its requisitions refused and its decrees mocked at. The fundamental basis of their belief was that the government should be supreme as to the powers granted, with full power to enforce its laws.

In this embryonic state of political thought how was the great problem of constitutional government to be worked out? Was it to be done by force of arms? Was it to be successfully dealt with in legislative halls dominated by partisan passion and prejudice? Or was the majesty of the law to sway the reason of men and bring them to sober judgment?

The Roman forum is in ruins, the eagles that once attested the glory and sway of her empire have crumbled into dust, but the voice of Justinian still speaks, fixing the limits where justice begins and injustice ends.

It was the golden era of Parliament when Burke, Pitt and Charles James Fox leveled all their powers against the slave traffic of the British nation, but even the elo-

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quence of the masters was dumb beside the voice of Mansfield proclaiming from the judgment seat that "the air of England has long been too pure for a slave, and every man is free who breathes it." Was history to repeat itself? Was some lofty character to rise up, some superior mind gifted with the prerogative of genius and speaking with the power of law impart to a parchment "inanimate and inarticulate the voice of sovereign command?"

Could some master mind so simplify this complex mechanism as to vest the General Government with full and complete powers for every legitimate end, and still so carefully preserve the autonomy of the States that both could march forward in harmony? Could the great judge be alike the seer and the prophet to transmute "the letter that killeth unto the spirit that maketh alive," and lay in judicial decrees the basis for adjustment to meet the needs of the wondrous growth and developments of the future?

Was some one great enough to so mould the plastic conditions of political thought as to lead the people by the power of irresistible reason and logic to see the truth which is never partisan, but which

> ". . . is the light
> To guide the nations groping on their way."

It is the lesson of history that there are crises in the life of a nation when success or failure depends upon the man equal to the hour. Two such occasions had arisen, and each time it devolved upon that sturdy New Englander, John Adams, to find the man.

We are told that there is a "Divinity that shapes our ends." In the old Continental Congress, when the country

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was thrilled with the shots fired at Lexington and Concord, when petitions to the King had ceased and there was a call to arms, perhaps it was some unseen Spirit that whispered into Adams' ear, as with a sense of the tremendous responsibility of the hour, he arose and nominated for commanding chief of the American forces George Washington of Virginia. A quarter of a century has now passed by. The sacrifices evidenced by the blood that stained the snows at Valley Forge had been wiped out by the crowning victory at Yorktown. The sword had made good what the pen had declared. We had successfully passed through the critical period of American history, that period in which we well nigh lost in peace all that we had gained in war. The Constitution had been formed and adopted. The government had been successfully launched under the administration of Washington and the country lifted up from Colonial dependence to the position of a great Nation.

The Federalist party had been defeated and it was the closing hour of its last administration. There was a vacancy at the head of the Supreme Court, a body that was to be the final arbiter of the most momentous questions ever submitted to any tribunal. President Adams was called on to act. Mayhap as the commission was about to go forth to the first judicial officer of the country, the same voice again whispered into his ear, and caused to be writ in that commission the name of one whose fame was to grow with the ages, for the language of Justice Story was neither strained nor exaggerated, that "even if the Constitution of this country should perish, his glorious judgments will still remain to instruct mankind until liberty shall cease to be a blessing."

It was the name of the Great Chief Justice.

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Address of James L. Blair.

Marshall's great fame as a jurist has almost overshadowed his other qualities, yet he earned distinction as a soldier, performed most valuable services to his country as a diplomatist, and stood amongst the foremost men of his time as a statesman. Like Michelangelo, who is known in the present age as a painter only, though pre-eminent among his contemporaries as a sculptor, poet and architect, the great Chief Justice is now popularly known only in that capacity. On this occasion, commemorating the beginning of his long career as a jurist, it is both pleasing and profitable to recount his high attainments in other ways less known, though but little less to be admired. . . .

After sketching Marshall's private life and public career prior to his appointment as Chief Justice, Mr. Blair proceeded:

This closes the narrative of Marshall's active public life, though after his accession to the Supreme Bench he continued to take a lively interest in the political affairs of his own State and the Nation, and served in the Virginia Constitutional Convention of 1829.

Marshall was a Federalist, but not of the extreme school of Hamilton, yet he was denounced as an advocate of aristocratic principles, a loyalist and an enemy of republicanism.

His theory of government caused him to view with fear the extreme State-rights doctrine held by the dominant party in his native State. Of this he says: "The word State-rights, as expounded by the resolution of 1798 and the report of 1799 construed by our legislature, has a charm against which all reasoning is vain. Those resolutions and that report constitute the creed of every

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politician who hopes to rise in Virginia; and to question them, or even to adopt the construction given by their author, is deemed political sacrilege."

In his great decisions interpreting the Constitution, which like rare jewels illumine the history of our jurisprudence, were involved political questions of the highest moment. He was, as Justice Story says, "The very oracle of the law;" but no man who did not combine with a knowledge of the law a genius for statesmanship could ever have exhibited the breadth of view, the consummate wisdom which characterized these judgments. He had been accused of being the mere technical lawyer; the man of books, incapable of rising above precedent. Nothing could have more completely refuted this charge than the decisions in Marbury *v.* Madison, Cohens *v.* Virginia, M'Culloch *v.* State of Maryland, and Gibbons *v.* Ogden. The exact knowledge of the political structure of our government, the comprehensive view of the interrelations of its departments and of the necessity of construing the Constitution so as to make it an efficient charter of powers and not "a splendid bauble," these were essential to an understanding of the questions involved and to their true determination, and these he possessed in the highest degree. A Coke, an Eldon could never have scaled these heights. Only the combined genius of the jurist and statesman in a Mansfield or a Marshall could have penetrated to the heart of these great problems and found their true solution. When we remember that in adopting the Constitution we embarked upon an unknown sea, where the charts which had guided lawyers and statesmen of former ages were more calculated to mislead than to guide; when we consider that the bitterness of faction made issues so sharp that upon

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most of these questions every legal argument was an acrimonious political debate; when we remember the vast field to be covered and the fearful consequences of error, we cannot but contemplate with awe the majestic sweep of the genius of the man who, with the unerring insight of his incomparable mind, made bright the dark places and saved the Nation from disaster.

What is the essence of human greatness none can define; certainly not in the abstract, and only approximately in the case of any particular person. It does not consist in any one gift or trait, for in such case there results only the specialist of greater or less note. Nor does the possession of many such qualities necessarily make their possessor great. In the case of Marshall, his eminence rested upon the rare assemblage of certain faculties, each of special excellence in itself, and in harmonious conjunction supremely effective; amongst these must be classed the instant perception, the complete analysis, the swift co-ordination of facts; the immediate discernment of their inter-relations, the unerring induction or deduction of causes or consequences, and the intuitive application to those of the appropriate law or the controlling principle, all without effort, without even a consciousness of the process. And these faculties so well ordered and elastic that in every department of human affairs they worked as easily as if specially constructed to meet each particular case. Among these qualities must also be included both moral conviction and exalted sentiment, for these are components of all true greatness. It was in this union of qualities that the supreme power of Webster consisted; it was the want of some of these elements that made Bacon the "wisest, brightest, meanest of mankind." Without this just admixture, without

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this poise and balance, which harmony alone can insure, the greatest gifts are often valueless; in their symmetrical association consists genius. And the only touchstone of this collective endowment is adequateness for every condition, competence to deal successfully with every situation.

This peculiar combination of essential qualities Marshall possessed in greater perfection than any other of our public men excepting Webster. This is the foundation of his greatness, his versatile greatness. No human intellect ever dealt with larger problems of more varied complexity, and none of greater moment to the human race. To none of these were his great powers unequal, in dealing with all he showed that variety of excellence which transcends the severest exactions of criticism. In commenting upon his extraordinary qualities, whether singly or in symmetrical combination, language which in the case of most men would be mere panegyric, seems in his case commonplace; our tongue contains no phrase of eulogy which, when applied to him, can be called exaggerated.

> "Formed for all parts, in all alike he shined
> Variously great."

It is one of his distinctions that the more his life is studied the greater he appears. In most of the great men in history there is some inequality, but all the public acts as well as the private life of Marshall reward the closest scrutiny with an increased admiration for his great powers and disclose no defect. He is one of the few great men of the world whose acts are so widely accepted as precedents and whose words have crystallized into maxims. He was indeed "*totus teres atque rotundus.*"

The speeches and writings of Marshall were entirely

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without polish, but directness, lucidity and force were their main features. One marked characteristic of his diction was his use of simple, strong words of Anglo-Saxon derivation. He often used direct questions as a means of exhibiting the vice of his adversary's position. A good example of this latter practice, as well as an illustration of his far-sighted statesmanship, occurs in the debate upon the Constitution, where, in answer to the objection that the adoption of that instrument would result in the loss of the Mississippi river, he asked: "Have we no navigation or do we derive no benefit from the Mississippi? How shall we retain it? By retaining that weak government which has hitherto kept it from us? Is it thus that we shall secure that navigation? Give the government the power to retain it and then we may hope to derive actual advantages from it."

And again, when it was said that the adoption of the Constitution would absorb in the Federal service the virtue and talent of the country, he adroitly used this argument as an answer to the fears of its promoters that the Federal officials would oppress the people, saying: "Will our most virtuous act the most wickedly?" That famous passage in his plea for the Federal courts well illustrates his high conception of the judicial office and his power of statement. Said he: "I have always thought from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt or a dependent judiciary."

Though it is not within the scope of my theme, I cannot forbear a word as to his personality. He was notable for simplicity of manner and absolute purity of thought. A perfect modesty permeated his whole life, and it adds

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not a little to the greatness of one who must have been conscious of his powers, and who yet showed constant deference to all men. His integrity was without blemish; he had that very "chastity of honor which felt a stain like a wound." A heart full of tender sympathy for old and young, a buoyant nature, rejoicing in friendly intercourse with all, and a profound religious sentiment, were conjoined in him with a deep-seated regard, almost reverence, for women. To Harriet Martineau he said that he had a steadfast conviction of their intellectual equality with men, and with this a deep sense of their social injuries; his own pure heart gave him a clear perception of the purity of theirs. His candor was perfect. John Randolph, his bitterest opponent in the Virginia Convention, publicly testified to this virtue. It was this quality which gave such weight to his arguments and decisions, for no public man of his day, except perhaps Thomas Jefferson, however divided from him by party lines, ever questioned his sincerity. He never spoke ill of any man, and his generosity was "as large as his mind and as unostentatious as his life."

When we consider all the attributes of this remarkable character, his learning, his wisdom, his patriotism, in happy union with his charming personality and superb intellectual equipment, his inestimable services to his country in the formation of the government and the preservation of its institutions, we cannot but feel that we stand in the presence of one of the greatest of mankind; one whose qualities of the heart endear him to every American, and whose peerless intellect must ever sustain him upon the very summit of human admiration.

It is well, then, that we do honor to his memory; well that we should recall those matchless endowments of

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mind which raised him to imperishable fame; but while we treasure, as a priceless national heritage, the memory of Marshall, the soldier, the great lawyer, the able diplomat, the candid historian, the eminent statesman, the devoted patriot, and the greatest jurist in our history, let us not forget that the brightest ornament of this immortal career is the serene and stainless virtue of Marshall the man; a virtue that knew no "variableness, neither shadow of turning."

Address of Elmer B. Adams.

So much has been spoken and written of John Marshall during the last one hundred years and more that I cannot hope to express a single new or original thought concerning him. I can only attempt to refresh the memory concerning some of the prominent features of his character and judicial career.

In order to properly appreciate his services as a jurist, it is necessary to call attention briefly to the progress of Federal jurisprudence and to the estimation in which the judicial office was held at and before the time he was appointed Chief Justice.

The Constitution of the United States had created a system of government radically different from that under the Articles of Confederation. The several States had surrendered a part of their sovereign power to the United States, and thereafter had to learn the difficult lesson how to exercise their own reserved powers harmoniously with those conferred by them upon the Nation. The decision of the Supreme Court in the great case of Chisholm *v.* Georgia (2 Dallas, 419), that a sovereign State might be arraigned before the Supreme Court at the instance of a private citizen of another State, had so shocked the then prevailing sentiment as to cause the immediate adoption

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of the Eleventh Amendment to the Constitution as a necessary antidote for what appeared to many to be an impious infraction of the sacred dogma of State sovereignty.

While it is freely admitted that the early judges in the case of Calder *v.* Bull (3 Dallas, 386), and some other like cases, had so expressed themselves as to give encouragement to the friends of the Constitution, it must be conceded that the burden of subordinating the authority of the States to the limited authority of the Nation, and of creating a new and radically changed sentiment recognizing national authority within its constitutional limits, was so great that comparatively little was accomplished during the first decade of the court's existence. There seems also to have been a failure to appreciate the full dignity and responsibility of the court on the part of its judges.

It was at this incipient stage in the progress of establishing national supremacy, at this period of doubt and distrust concerning the dignity and utility of the court, that John Marshall became Chief Justice and assumed the responsible duties of that great office.

He brought to his new position a mind trained and enriched by diversified and important public service; he had been a brave and courageous soldier deeply imbued with the revolutionary spirit; had risen to distinction at the bar of his native State in competition with lawyers like Patrick Henry, Nathaniel Pendleton and George Wythe; had achieved renown in legislative halls, both State and National; had been high in the councils of the immortal Washington; had served President Adams in the execution of delicate diplomatic trusts; had been an ardent advocate of the adoption of the Constitution and one of its ablest and most effective defenders when afterwards assailed.

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One hundred years ago to-day, on the occasion of the first meeting of the court in the city of Washington, John Marshall took his seat as Chief Justice. His first associates were William Cushing, William Paterson, Samuel Chase, Bushrod Washington and Alfred Moore. One of these men had been a member of the court since its organization in 1789, and each of the others was more or less experienced in the consideration of the great questions likely to arise; but, notwithstanding these facts, Marshall's intellectual strength and vigor, and his superb self-confidence and courage, forthwith, modestly but effectually asserted themselves and he became at once chief in deed as he was in name. The reports of decisions before that time show that the Associate Justices generally had prepared the opinions of the court. From now on a striking change appears. The new Chief Justice becomes at once the organ of the court and continues substantially so throughout his long term of service. For the first five years he delivered the opinion of the court in every case submitted to it, with the exception of less than a half dozen, and in most of these he was disqualified because he had been of counsel to one of the parties litigant. During the next seven years he wrote over one hundred and thirty opinions as against about fifty by all of his associates together. While the same proportion is not kept up in the later years of his incumbency, it is nevertheless true that at no time did any of his associates nearly approach him in the number of opinions written by them. But it is not to the number of his decisions that special significance is attached. Their character and quality is what has given him imperishable fame; to these, then, reference must necessarily be made in considering the subject assigned to me for this occasion.

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During the first year of his official life the great case of Marbury *v.* Madison (1 Cranch, 137) came before the court, and in the decision of that case he first exhibited as a judge that great breadth of intellectual vision; that wonderful power of logic; that clear perception of the broad fundamental meaning of the Constitution, and that profound appreciation of the principle of National sovereignty, which signally distinguished him throughout his entire judicial career.

Time forbids and the intelligence of this assemblage of lawyers renders it unnecessary for me to enter into any detailed statement of the facts of this well-known case. It was the first judicial outcropping of the irrepressible conflict between the Hamiltonian and Jeffersonian constitutional theories. It was contended that the delivery of a commission to a person legally entitled thereto was a political act belonging to the executive department alone, for the performance of which entire confidence was reposed by the Constitution in the executive department, and with the non-performance of which the courts had no concern. The fallacy of this contention was clearly exposed by the inexorable logic of the Chief Justice, thus: "When an officer is directed peremptorily to perform certain acts; when the rights of individuals are dependent upon the performance of those acts, he is so far the officer of the law, is amenable to the laws for his conduct and cannot at his discretion sport away the vested rights of others. . . . When specific duty is assigned by law and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

This decision established the important principle that

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executive officers are amenable to the courts of the land with respect to many, if not all, of their strictly ministerial duties.

But that case, as generally regarded by the profession, is more celebrated as the first unequivocal judicial declaration that the Supreme Court of the United States was possessed of jurisdiction and power to declare an act of Congress void if in violation of the Constitution, and that its duty was to fearlessly exercise that jurisdiction and power whenever occasion demanded it.

The inherited traditions of the people, the well-known omnipotency and inviolability of the acts of the English Parliament; familiarity with the sovereign and irresponsible power of State legislatures under the Articles of Confederation; and above all, the vigorous and aggressive policy of the Anti-Federalist party then in control of the government in favor of a strict construction of the Constitution, rendered submission to any restraints upon legislation, novel and uncongenial; and the first attempt to enforce that restraint by the judicial department was looked upon by many as an intolerable usurpation of power.

For this reason, doubtless, Marshall did not content himself by a summary disposition of a question, which seems to us in the clear light of to-day of easy solution, but in a spirit of great earnestness and candor and with irrefutable reasoning proceeded to elaborate at length the great principle that the Constitution is the supreme law, unchangeable by ordinary legislation, and therefore that a legislative act contrary to the Constitution is not law. He then exhaustingly discusses the powers of the judicial department and concludes, using his own language: "It is emphatically the province and duty

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of the judicial department to say what the law is, . . . and if two laws conflict with each other the courts must decide the operation of each." "This," he says, "is the very essence of judicial duty."

That great case, although severely criticised at the time by strict constructionists as largely *obiter* and as an unwarrantable extension of the Federal principle, forthwith marked the new Chief Justice as an able and fearless expounder of the Constitution, and has from that day to this been universally recognized as establishing one of the great corner-stones of our constitutional jurisprudence.

Many other cases of considerable moment relating to a variety of subjects, such as patent rights, salvage, prize, insurance, practice, pleadings and jurisdiction, were, in their order, patiently heard and conscientiously disposed of by him. To these the time at my disposal will not allow any reference. But in 1809 another great case arose involving principles vitally affecting the stability of the Nation. The State of Pennsylvania had passed an act requiring its Governor to demand certain money, the proceeds of the sale of the sloop Active, contrary to the decree of the United States court concerning the same, and requiring the Governor to use any means in his power necessary for the protection of what is in the act said to be "the just rights of the State," and also requiring the Governor to protect the defendants and their property against any process whatever issued out of the Federal courts. This was a defiant challenge of the Federal authority, and the question presented in the *mandamus* proceedings brought against the District Judge (United States *v.* Peters, 5 Cranch, 134) was whether the process of the United States courts could be executed in the State of

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Pennsylvania. The Chief Justice met this question with characteristic firmness and courage. He starts out with the inspiring assurance that the court has considered the question "with great attention and with serious concern," and immediately proceeds with a convincing, logical demonstration that the legislature of a State cannot annul the judgments nor determine the jurisdiction of the courts of the United States. A few of his grave and powerful expressions in this case well illustrate his judicial style. He says: "If the legislatures of the several States may at will annul the judgments of the courts of the United States and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the Nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. . . . It will be readily conceived that the order which this court is enjoined to make by the high obligations of duty and of law is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty and therefore must be performed. A peremptory *mandamus* must be awarded." Threats of resistance and civil insurrection ensued, but the judgment of the court was executed and the majesty of the law vindicated, and another corner-stone of national supremacy was so permanently laid that no State, by its legislature or otherwise, has since then, save in the short hiatus occasioned by the Civil War, seriously interfered with the execution of the process of the Federal courts.

Without referring to many of the great opinions which fell from his pen in the intervening years, reference must be made to the very important case of M'Culloch *v.* Maryland (4 Wheaton, 316).

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After declaring the Act of Congress incorporating the Bank of the United States to be a constitutional exercise of power intended to aid in the execution of some of the enumerated powers of government, the Chief Justice proceeds in his inimitable way to a demonstration that the State cannot tax an instrumentality of the Federal Government. It was in this case that Marshall used the oft-quoted aphorism: "The power to tax involves the power to destroy." Believing that this case best illustrates his logical and exhaustive methods of reaching and stating conclusions, I will ask you to listen for a moment to a few excerpts taken from his opinion. He says: "Let us resume the inquiry whether this power can be exercised by the respective States consistently with a fair construction of the Constitution? That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another . . . are propositions not to be denied. . . . Would the people of any one State trust those of another with the power to control the most insignificant operations of their State Government? We know they would not. . . . If we apply the principle for which the State of Maryland contends to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of Government, and of prostrating it at the foot of the States. . . . If the State may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument. . . . They may tax all the means employed by the government to an excess which would defeat all

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the ends of government. This was not intended by the American people. They did not design to make their Government dependent on the States."

With what stately march these words proceed! With what convincing power do they fall from his pen! Who could in reason controvert the inevitable conclusion? Three generations of lawyers and judges have done them respectful and obedient homage. On the authority of the principle laid down in this decision the Supreme Court subsequently, in Collector *v.* Day (11 Wallace), held that the converse of the proposition was also true; namely, that the Federal Government cannot tax an instrumentality or agency of the State Government.

The Dartmouth College case (4 Wheaton, 518) marks another significant advance in the progress of National development.

The effort of the distinguished counsel for New Hampshire was to limit the contracts inviolable by State legislation to transactions between individuals respecting property, but the conclusion reached established a broader and more comprehensive scope for the constitutional provision in question, and bound States and municipalities no less than individuals to the obligations of their contracts. This great case has been the bulwark of corporate franchises and property, and to this day is the leading case cited by the profession in support of the proposition that legislative grants and privileges once conferred are protected from infraction by any subsequent legislative act, unless power for that purpose is reserved in the act granting the franchise.

The last of the great cases to which my limited time will permit any extended reference is Cohens *v.* Virginia (6 Wheaton, 264). This case, by reason of the moment-

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ous questions involved, as well as the clear, courageous and convincing exposition of them, is undoubtedly a beacon light in our constitutional jurisprudence, and is one of the most enduring monuments to the memory of the great Chief Justice.

Attention might be called, had I time, to another great case, Gibbons *v.* Ogden (9 Wheaton, 1), in which the court, by the great Chief Justice, expounded the commerce clause of the Constitution so satisfactorily and so conclusively that hundreds of later decisions have consistently reposed upon its authority.

In these days of grave National issues, when plain constitutional safeguards and restraints oppose the ambitious projects of men, it is not uncommon to hear, by way of attempted justification of their plans, that the Constitution as interpreted by Marshall is so elastic as to warrant any legislation compatible with and necessary to work out what they are pleased to call "manifest destiny." They say the Constitution as so interpreted by him was such a departure from the text of that instrument as to render it scarcely recognizable by its original framers; that Marshall gave it an expansiveness of operation which fully justifies their contentions.

This kind of argument I believe to be totally unwarranted by the facts, and resort to it must be born of an urgent necessity for some sustaining authority. No candid man can read Marshall's elucidation of any of the provisions of that great instrument without intellectually acquiescing in the same and even wondering how any other conclusion could seriously have been contended for.

He never perverted an express power nor enlarged it beyond its fair, reasonable meaning. He never gave his approval to the exercise of an incidental power without

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clearly and satisfactorily demonstrating that it was, within the true meaning of the Constitution, appropriate and necessary for carrying into execution some one of the expressed powers.

That profound jurist who held, in Loughborough *v.* Blake (5 Wheaton, 317), that the power of Congress to levy and collect taxes, duties, imposts and excises, subject to the proviso that they must be uniform throughout the United States, "extends to all places over which the government extends;" that the term "United States," as there employed, "is given to our great Republic, which is composed of States and Territories," and that the "District of Columbia or the territory west of the Missouri" (as it was in 1820 when that decision was made) "is not less within the United States than Maryland or Pennsylvania," cannot be fairly quoted or claimed as authority for the contention that the provision of the Constitution requiring all taxes, imposts and duties to be uniform throughout the United States should be so construed as to deprive a Territory subject to the Government of the United States of its protection and benefit.

Would that the spirit of the wise and intrepid expounder of the Constitution, whose memory we honor tonight, could descend upon, guide and inspire us in these days of National peril!

I have now briefly referred to a few of the great leading opinions on important constitutional questions delivered by Marshall during his illustrious career as Chief Justice. These, I believe, are generally regarded as his greatest efforts and his most valuable contributions to constitutional law. More than fifty other cases involving the construction or application of important constitutional provisions were before the court during his time.

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In most of these he wrote the opinion of the court, and these opinions also are marvelous examples of powerful and logical reasoning.

It should be remembered, in placing a proper estimate upon his work, that, unlike the judges of the present day, he had very little, if any, authority to guide or aid him in reaching conclusions. He depended most largely upon the reasoning faculty, aided by able, exhaustive and conscientious argument of counsel, to which he always gave critical and devoted attention.

He impressed all litigants with the confident assurance that their causes had received his patient and exhaustive consideration.

In the last opinion ever rendered by him (Mitchel *v.* United States, 9 Peters, 711), he left as a valuable legacy to the judicial office everywhere, and for all times, a concise statement of his rule of conduct as a judge. He says: "Though the hope of deciding causes to the mutual satisfaction of parties would be chimerical, that of convincing them that the case has been fully and fairly considered, and that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case, may be sometimes indulged."

So unerring were his conclusions on the momentous questions before him, that, notwithstanding the great learning, ability and patriotism which have characterized the Supreme Court since his day, not one of his judgments, according to the statement of Judge Dillon in his book on "Laws and Jurisprudence of England and America," has ever been overruled by that court, and "no political party proclaims or holds tenets or doctrines inconsistent with the principles on which his judgments rest."

He died July 6, 1835, after something over thirty-four

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years of continuous and unparalleled service as Chief Justice, and after a long life-time of eighty years distinguished throughout by an earnest, simple piety, absolute probity and noble deeds of loyalty and devotion to his country.

He lived to see, as a result largely of his own work, the court which Chief Justice Jay had pronounced unequal to the task of adequately supporting the National Government, rehabilitated and clothed with recognized dignity, power and authority. He lived to see that public sentiment, which at first bitterly criticised his constitutional judgments, so changed as to cheerfully submit to them.

As a result of his work, the principle of National supremacy became firmly established. The Constitution became in fact, as well as in theory, the supreme law of the land. The National Congress, State legislatures, State courts and municipalities of all kinds, executive officers, both State and National, as well as individuals in the conduct of their private affairs, were taught to recognize its lawful restraints and submit themselves to its sovereign dominion to the full extent not only of all its enumerated powers, but of all other powers necessary for the efficient exercise of such enumerated powers.

Marshall is and forever will be chiefly known as the great expounder of the American Constitution.

I have dwelt so long upon his work and reputation as a constitutional jurist, upon which his great fame chiefly reposes, that I cannot give any attention to his treatment of other subjects of Federal jurisdiction. I may, however, briefly remark that during his incumbency of the office of Chief Justice a vast range of subjects of general common law, equity and admiralty jurisdiction received his intelligent and conscientious consideration and treat-

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ment. In all this work he was greatly distinguished for his patience, wisdom, sagacity and inexhaustible research.

Fully realizing and appreciating the high character, learning, wisdom and courage of many another judge, who has during the last sixty-six years honored and graced the benches of the great courts of the land, Chief Justice Marshall stands so conspicuously pre-eminent, that I deem it no disloyalty or injustice to any of them to repeat in closing the comprehensive and affectionate question put by Mr. Justice Story. "When may we again hope to see so much moderation with so much firmness; so much sagacity with so much modesty; so much learning with so much purity; so much wisdom with so much gentleness; so much splendor and talent with so much benevolence; so much of everything to love and admire with nothing, absolutely nothing, to regret?"

Exercises at Kansas City.

Marshall Day was observed at Kansas City under the auspices of the Kansas City Bar Association by appropriate proceedings in the Circuit Court of the United States and in the Circuit Court of the State, and by a dinner given by the Association at the Midland Hotel on the evening of that day. In the United States Circuit Court a motion to adjourn in honor of the day was made by William Warner, United States District Attorney, which was followed by remarks by Gardiner Lathrop, Daniel B. Holmes, and L. C. Boyle. Some extracts from these as stenographically reported are given below:

Remarks of William Warner.

To-day the American people, from ocean to ocean, commemorate John Marshall's appointment as Chief Justice of the United States; an event pregnant with untold

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blessings to this people. In that high office Marshall had predecessors and has had successors, but no equal. He, and he alone, stands forth as the great Chief Justice.

Without precedent to guide him, he became the interpreter and expounder of the Constitution. For all time he determined that a written constitution has sufficient flexibility to solve all questions, whether at home or abroad, affecting the honor and safety of the Nation. To his Americanism, judges, lawyers and layman, alike, pay homage.

Before he assumed the judicial ermine, as a soldier and statesman he had earned the respect and admiration of his fellow-citizens. He came out of the battles of the Revolution imbued with the conviction that in a nation and not in a confederacy lay the safety of the colonies. As a statesman his great abilities and untiring energies were given to securing the adoption of the Federal Constitution. He went upon the Bench with the conviction that the first duty of a citizen was his allegiance to his nation.

It was the creative brain of a Jefferson that gave to the world the Declaration of Independence — the birth-cry of a "government of the people, by the people and for the people." It was under the enchantment of the masterful genius of that mighty magician of finance, Hamilton, that the beautiful fabric of public credit rose in full majesty upon the ruins of the old confederation, causing commerce and agriculture to awaken from its sleep of death.

It remained for John Marshall, by a series of great decisions, to clothe the skeleton of the Constitution with muscles of robust power. Into the Constitution, which many had been accustomed to regard "as a frail and

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worthless relic," he breathed the breath of life. His opinions are, and ever will be, the landmarks between Federal and State authority.

In the language of a distinguished Senator, Chief Justice Marshall's decisions "are more than a monument of legal learning, more than a masterly exposition of the Constitution, they embody also the well considered policy of a great statesman." The Constitution began as an agreement between conflicting States; Marshall, continuing the work of Washington and Hamilton, transformed it into a charter of national life.

Remarks of Gardiner Lathrop.

If the court please, I came here to listen to-day and not to speak. The spirit which John Marshall infused into the Constitution of our country has borne fruit through all the years down to the present. Had it not been for that spirit, the Federal judiciary, in my judgment, throughout the length and breadth of the land, would not have been able to administer justice in the broad and catholic spirit in which it has been dispensed in the different districts of our country. As Major Warner well and eloquently said, Marshall found that the Constitution meant something more than a mere binding together of the colonies; it meant that we had grown from the time of the confederation into a nation, with powers distinct from the States, with powers imposing limitations on the States, powers broad enough and great enough to control the States where their laws came in conflict with the Constitution of the General Government. God, in my humble judgment, always raises up men for the times. Washington was the man for the Revolution; he was the man for the first Presidency of the Republic.

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But above all others, from a lawyer's standpoint, stands John Marshall. When questions first came for settlement as to whether this country was a nation or not, whether the General Government had the powers denied to the States or not, God raised up this man to say this was a Nation! He also raised him up to say that there were limitations beyond which the legislative branch of the Government could not go; and when its acts did not square with the just principles of the Constitution, the laws must fall, under the decisions of upright judges.

Marshall was a man cast in a vigorous mould, not depending much upon precedents and authorities, but working out from principle those opinions that will forever live wherever the English language is spoken. It is in this age of greed a very gratifying thing that the American people, and especially the American Bar, can turn from the pursuit of the ordinary vocations of life and do honor to one of their greatest representatives, who reflected credit upon them all. It goes to show that honest merit, that great ability, that unswerving integrity, still have a place in the world, superior to the mere acquisition of wealth; and that the man who does his duty well and faithfully will live in the grateful memory of those who come after him.

Remarks of Daniel B. Holmes (in part).

In my judgment it is quite impossible for any one to extol or praise John Marshall beyond his merit. He was the great constructive genius of the American judiciary. He appreciated the fact, which he had learned in his study of the common law, that although in theory the courts were not legislative, yet in point of fact they were; and that the great principles of the common law had been practically enacted by the courts of Great Britain.

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When questions arising under the Constitution of the United States were presented, his constructive genius came to the rescue; and with the feeling that he was not tied down by precedent he grasped the propositions which were laid before him, and in that legislative spirit, controlled by a judicial mind of the highest order, such questions were all determined by Marshall with a wisdom unequaled before or since. The service which he has rendered to this Nation is one which will live and will stamp him for all time as the great genius of the Constitution.

Remarks by L. C. Boyle (in part).

John Marshall was a great constructive lawyer, as has just been stated,— he built upon the frame of the Constitution the national structure, and I think it is important to notice that he was also jealous of the rights of the States as distinct from the rights of the Federal Government. Although he was the first interpreter of the national charter, he never forgot or overlooked the integral parts that together make the great Union. He was just as jealous for the rights of the States as he was for the rights of the General Government.

Remarks of Henry D. Ashley.

Mr. Ashley in part said: I consider the fact that all over this land the lawyers and people are turning back to the memory of the great John Marshall is a refutation of the notion sometimes expressed, that the lawyers as a profession have lost their high ideals.

Remarks of E. H. Stiles.

I consider John Marshall as the representative of the doctrines of American constitutional jurisprudence. He

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belongs to the class of men who are born great, and also to the class of men who achieve greatness by their own exertions. His whole life prior to his appointment as Chief Justice was a preparation for the duties of that great station, and in the performance of its duties his judicial character and reputation may be said to be peerless.

In his personal appearance he had quite as much to contend with as did Mr. Lincoln. He is said to have been tall, angular, homely and awkward in appearance, and throughout, very far from being an Adonis. Rufus Choate is reported to have said concerning Chief Justice Shaw, who was a very homely man, that he approached him as a Hindoo did his idol; he knew that he was ugly, but he knew that he was great. In such manner must the great jurist, whose name we to-day honor, have been approached by the lawyers of that period.

Response of Judge John F. Philips in behalf of the Court.

The American bar has fitly designated this as "John Marshall Day." It is the centennial of the appearance upon the Bench of John Marshall as Chief Justice of the Supreme Court of the United States. His work in that office marks an epoch in American history and jurisprudence. It fell to his lot, more especially, to give interpretation and application to the Federal organic law. The results of his expositions upon our national life are incalculable.

With a large comprehension of the design of the Federal Constitution, he felt in construing it, as did the great Apostle, "that we should serve in newness of spirit and not in the oldness of the letter." He liberated the

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spirit that dwelt beneath the surface of the Constitution and vivified its life. What the disputatious have inveighed against as the latitudinarianism of the doctrine of implication, under the resistless logic of his analysis became the very essence of the Constitution. Under the magical touch of his pen, that which was obscure became luminous; its supposed weakness and infirmities became pregnant with power and authority, and prescient of the greatness and glory of the future of the Republic. His opinions were absolutely free from dogmatism or ostentation. Yet because of his known intellectual honesty and earnestness, he disarmed opposition, and by his simple but cogent reasoning he persuaded and convinced.

No man contributed more than he to make the profound, enduring impression upon the people that the Federal Constitution is indeed the supreme law of the land. Through the vicissitudes of a century, the ceaseless ebb and flow of the tide of agitation, the struggles of parties, the exploits of commerce and trade, amid the clash of arms in internecine strifes, his interpretations and applications of the fundamental chart of our liberties have challenged the admiration of the best intelligence of the age, silenced measurably criticism, and defied and balked legislative and executive encroachments, both State and Federal. So that it is the marvel of publicists and statesmen, how people, legislators and executives, scholars and unlearned alike, have bowed willingly to his rulings. And now, after the test of a century, it is the consensus of reasonable and patriotic men that the decisions of Chief Justice Marshall mark him as the greatest jurist that ever presided in the most august judicial tribunal of the civilized world.

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As a deserved mark of respect to his memory it is ordered that this court do now stand adjourned until to-morrow morning at 10 o'clock.

Proceedings in the State Circuit Court.

The records of the court show that Clarence S. Palmer, President of the Kansas City Bar Association, moved the adjournment of the court in honor of the day. The motion was supported by J. V. C. Karnes, C. O. Tichenor, L. H. Waters, J. McD. Trimble and O. H. Dean.

Mr. Karnes, after briefly sketching Marshall's private life and his judicial career, concluded his address as follows:

Address of J. V. C. Karnes.

Viewed in the light of subsequent history I do not believe there has lived any other man, not excepting Washington or Lincoln, to whom the American people owe such a debt of honor and gratitude as to this peerless jurist.

We read in classic history that on the fatal day that Socrates was condemned to drink the poisoned hemlock he summoned around him his disciples — those who had been his followers — and discussed all of the great questions of life and death and immortality, and in referring to some secular matter, one of his most beloved followers incidentally remarked that "on to-morrow we will bury Socrates." He at once corrected him by saying: "On to-morrow you will bury Socrates' body, but not Socrates." So I say that Marshall's body has long since mouldered to dust, but the real Marshall will still exist, still be a vital force as long as constitutional government remains.

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Banquet at the Midland Hotel.

At the banquet held in the evening, the principal address was made by Sanford B. Ladd, given below. There were also extemporaneous responses to sentiments appropriate to the occasion by John W. Snyder, W. H. Rossington, William Moore and Smith P. Galt, no report of which has been preserved.

Address of Sanford B. Ladd.

The time which may, with propriety, be occupied by a single address upon this occasion is sadly inadequate, even if it were at the disposal of the most gifted, in which to recall the services or render deserving tribute to the memory of one whose immortal name dwells today on every patriotic tongue. And I bespeak your generous indulgence for the manifold imperfections and omissions which must mark a brief retrospect of a long career, crowded from its opening to its close with the achievements of a matchless intellect.

On January 31, 1801, he was appointed by President Adams, unanimously confirmed by the Senate, and commissioned Chief Justice of the Supreme Court of the United States. "In this man," exclaimed one of the most eminent lawyers of the South, not many years ago, "what a legacy the dying Federalists bequeathed to the country!"

Nearly a generation after the appointment, John Quincy Adams, who was then President, in a letter inclosing a judicial commission, wrote:

"One of the last acts of my father's administration was the transmission of a commission to John Marshall as Chief Justice of the United States. One of the last acts

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of my administration is the transmission of the inclosed commission to you. If neither of us had ever done anything else to deserve the approbation of our country, and of posterity, I would proudly claim it of both for these acts, as due to my father and myself."

On the 4th day of February, 1801, Marshall took his seat as Chief Justice, at the opening of the court, which then convened for the first time at Washington. He was forty-six years of age. It was a critical period for the country. The Constitution, as it left the body which framed it, was a compromise, satisfactory to very few of those who signed it. It was regarded by many of the most earnest advocates of its ratification as a choice between evils, and, at the best, an experiment. They realized that the system which it was intended to displace would result in a speedy dissolution of the frail ties which bound the colonies together, and possibly an eventual return of some of them, for the sake of protection, to foreign subjection. And many of the enlightened patriots of 1787, rather than accept the alternative of threatened chaos, deemed it wise to give the proposed new governmental plan a fair trial, although oppressed with grave doubts as to its successful operation. And after all their efforts, the Constitution was saved as by fire. In the New York State Convention, composed of sixty-five members, the majority in favor of ratification was but three. In Virginia, out of one hundred and sixty-eight delegates, it commanded a majority of ten. No one of its features had been so strenuously opposed as that relating to the judiciary. It had received the stress of the attack. The scheme having been assented to with so much misgiving; powers, to whose exercise they had been accustomed, having been surrendered by the States with such great

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reluctance, it was not unnatural that the pretensions of the General Government should be noted with jealous scrutiny, and a disposition evinced to restrict its authority within the narrowest compass consistent with the terms of the grant.

The Constitution had been adopted, but there were many who had little love for it; a Union had been formed, but in some of its elements the cohesive disposition was far from zealous. Even among those who were devoted to both, diversity of views as to the meaning of the Constitution and the nature of the Union existed — views entertained with a sincerity so belligerent that mutual intolerance was the result. Already controversies were threatening as to the import of those provisions which limited the powers of the States; those which operated as checks upon the will of Congress; those which vested authority in the General Government. And last, but, as it transpired, most important of all, overshadowing all others, was the dispute as to the character and extent of the functions which had been assigned to the judicial department. The questions springing from these controversies were as yet unsettled. Their determination closely concerned the stability and success of the government and the peace of the country.

To the accomplishment of this great work, the court, under the leadership of Marshall, set itself with unflinching resolution. It first proceeded to determine, in its own favor, its own authority and jurisdiction to decide all questions arising under the Constitution. It then decided such questions, one by one, as they were presented, and in so doing declared, established, and anchored in eternal foundations those principles, which, if accepted and adhered to, would, Marshall firmly believed, ensure

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the harmonious working of all parts of the machinery of constitutional government. In the construction of that imperishable fabric of jurisprudence, which rose in strength and symmetry during Marshall's term of office, whose faultless workmanship has compelled the wonder and admiration of jurists and enlightened statesmen in every land, his was the guiding mind, his the directing hand. Of the sixty-one decisions upon constitutional questions delivered by the court during that period, thirty-six were written by him. History may safely be challenged to discover in its pages a record of judicial achievement equaling that of Marshall, if the test of comparison be the magnitude of the consequences directly traceable to its influence.

The limitations of the occasion forbid more than a brief reference to a meager number of those great judgments which enunciated principles which are now imbedded like bone and marrow in the structure of the government.

The case of Marbury *v.* Madison, decided in 1803, reported 1 Cranch, affords the first explicit declaration of the power and the duty of the judicial department of the government to disregard and declare void an act of Congress on the ground of its repugnance to the Constitution.

This determination of the power of the judiciary to test the validity of a legislative enactment by the standard of a written constitution has been accepted in every jurisdiction of the country as a decisive settlement of the question. The power then asserted has never since been denied.

But Marshall proceeded further. He held that Marbury had good title to the office, and that upon applica-

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tion to any proper court he would be entitled to a writ of *mandamus* against the Secretary of State to compel the delivery of the commission; observing that a court might rightfully issue a writ of *mandamus* directed to an officer of the executive department of the government requiring him to perform a duty which was purely ministerial in its character. The court having declined to entertain the cause, for want of jurisdiction, discussion of the other questions involved was *obiter*, and provoked at the time the severest criticism of Jefferson and his political associates. Obviously this criticism was well founded. But these observations of Marshall upon the merits of the case have obtained all the authority and acquired all the importance of an opinion upon a point in judgment, for, in the language of Mr. Justice Miller, "the principles there declared, which have never since been controverted, subjected the ministerial and executive officers all over the country to the control of the courts in regard to the execution of a large part of their duties."

The case is regarded as the footing-stone of the law of *mandamus*, as applied to executive officers, State and Federal, charged with the performance of ministerial duties. Based upon its authority, writs have issued to the Postmaster-General, to the Secretary of the Interior, and to the Commissioner of Patents. In several jurisdictions the Governor of a State has been brought to the bar of a court of his State, by an alternative writ of *mandamus*, and compelled to show cause why, although the chief executive, he should not be ordered peremptorily to proceed to the performance of a given act. In all such cases the *dictum* of the Chief Justice in Marbury *v.* Madison is the persuasive authority.

In 1821 he delivered the opinion of the court in Cohens

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v. Virginia, 6 Wheaton, which involved a jurisdictional question of the utmost consequence, to wit, whether the court possessed appellate jurisdiction from the final judgment or decree of the highest court of a State, rendered in a cause wherein what is now denominated a "Federal question" was involved. The jurisdiction had been asserted by the court in 1816, in Martin *v.* Hunter's Lessee, in an opinion by Mr. Justice Story, and it being now again the subject of dispute, the contention being that the appellate jurisdiction of the court extended only to the review of the judgments of inferior Federal courts, the question was re-examined by the Chief Justice, and by his opinion then delivered the jurisdiction so firmly established that Mr. Justice Field, in an opinion announced by him in 1880, remarked that the question had passed beyond the region of discussion for more than half a century.

When John Randolph read this opinion he said: "It is all wrong, but there is no man in the United States who can show wherein it is wrong."

From the exercise of this branch of its jurisdiction has grown a vast body of case law, forming no inconsiderable portion of the results of the work of the court. Hardly a volume of its reports can be opened without meeting one or more illustrations of it. The allowance of a writ of error to the highest court of a State is a familiar incident of the routine of judicial work.

The opinion in Gibbons *v.* Ogden, 9 Wheaton, characterized by Mr. Justice Miller as "that magazine of constitutional law," and by Mr. Justice Lamar as "that great opinion," was delivered in 1824, and is regarded by many as the most momentous utterance of Marshall's official life. . . .

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After a statement of that case and quotations from the opinion of the Chief Justice as to the proper rule of constitutional interpretation, the orator proceeded:

From the views therein expressed upon the question there presented, the records of that high tribunal, during the period of three-fourths of a century which has since elapsed, disclose no departure. It has been cited in one hundred and twenty opinions of the court.

The ever expanding consequences of this decision have kept pace with the growth and the marvelous industrial progress of the country. Its influence reaches and exercises a direct control upon agencies whose present practical development existed, if at all, only as a phantom in the wild dream of the visionary. By a steady movement in the direction in which the court then set its face, State statutes, among others, have been declared void.

After referring to such statutes, the orator continued:

These illustrations exhibit a steadily ascending flow of that tide of doctrine which has known no ebb.

Gibbons *v.* Ogden is the high authority upon which the judgments in all these cases rest. How imposing the superstructure which has been erected upon that sufficient foundation!

Although the question, when presented, was accounted as possessing political significance, it has long since ceased to be so considered. Differ as views may regarding the general principles of constitutional construction, this decision is accepted by all shades of opinion as a final and satisfactory settlement of the meaning of the commerce clause. It was the authority invoked by Congress in support of its claim of constitutional right to pass the Interstate Commerce Act. During the debate upon that

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measure, a distinguished Senator from the State of Texas thus referred to it:

"Every decision of the Supreme Court since Gibbons *v.* Ogden has been in line with the opinion in that great case, so that the doctrine announced in it is to-day as firmly established and as unquestionable as any other in the constitution or administration of our government. No single case in the whole range of our jurisprudence can be found which impugns it."

And the provisions of that important enactment, many of which were framed by an ex-Cabinet officer of the Southern Confederacy, and the whole adopted by a vote which knew no party line, would be but as sounding brass or a tinkling cymbal were they not charged with the resounding echoes of Gibbons *v.* Ogden, booming down the aisles of time, in ever-swelling, ever-augmenting volume.

Opinions of the highest importance, denying to a State the power of arbitrary rescission of a contract to which it was a party by virtue of its own grant; asserting the power of the United States to create a bank to be employed as an instrumentality of government; denying the right of a State to tax the bank or any other agency of the Nation, can be barely referred to here, and for want of time allusion to others must be entirely omitted. Marshall's labors were, however, by no means confined to the production of these disquisitions on constitutional questions with which his name will be forever associated. It has been ascertained that of the 1,100 opinions filed in cases decided by the court during his term of office, 500 were written by him. Judicial literature, in almost every branch of law, has been enriched by the creations of his genius.

Judicial rectitude and impartiality never met and sus-

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tained a more severe ordeal than faced John Marshall on the trial of Aaron Burr for treason.

Burr was brought to trial at Richmond, before the Circuit Court of the United States for the District of Virginia. On either side were arrayed, as counsel, some of the most eminent lawyers of their time, William Wirt, afterwards Attorney-General of the United States, having been specially retained by the government to assist in the prosecution. The Chief Justice presided.

The trial had proceeded for several days when an offer was made on the part of the United States of certain evidence, to be followed, it was understood, by more of the same class, the admission of which was indispensable to a conviction. Objection to it was made on behalf of Burr. The arguments upon the question occupied the attention of the court for eight days. The court then took a recess of two days, and when it reconvened Marshall resumed his seat.

The Chief Justice delivered an exhaustive opinion upon the question, covering nearly fifty printed pages. The evidence was excluded. The ruling was fatal to the further prosecution of the indictment, and under the direction of the court the jury returned a verdict of not guilty, and Burr was discharged.

So keen was public disappointment at the result, that the ruling was the object of severe and not always respectful criticism.

"Marshall," wrote Wirt to a correspondent, "has stepped in between Burr and death." "Why did you not," Wirt was asked, "tell Judge Marshall that the people of America demanded a conviction?" "Tell *him* that," was the reply; "I would as soon have gone to Herschel and told him that the people of America in-

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sisted that the moon had horns, as a reason why he should draw her with them."

In later years the dispassionate judgment of the profession, removed from the disturbing influence of contemporary excitement, has assigned to the ruling the impartial character which is its due, as having followed in close obedience the requirements of then existing law.

Marshall was a public educator. It fell to him to demonstrate to the people of the United States, by its practical application, the true meaning of the instrument by which they had elected to be governed. In the face of sincere and determined efforts to render nugatory certain of its provisions, a weaker man would have wavered and perhaps given way. His prophetic instinct clearly discerned that the continued existence of the nation depended upon the assertion and unyielding defense of the doctrine of its own supremacy. And he resolved that never with his aid or concurrence should the powers conferred upon the government be, by so much as one jot or one tittle, surrendered or disclaimed. He taught the American people certain important lessons which were well learned and have never been forgotten:

That the Constitution created a Nation in fact as well as in name:

That all means appropriate and adapted for carrying into execution the powers expressly granted to the government, and which are not prohibited but consist with the letter and the spirit of the Constitution, are constitutional:

That the Constitution and the laws made in pursuance thereof are supreme within the territory of every State:

That enactments, whether of Congress or the legislature of a State, repugnant to that Constitution, do not enjoy the sanction of valid laws, and may be disregarded:

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That the Constitution, to use his own language, contains what may be deemed a bill of rights for the people of each State, serving as a shield for themselves and their property from the effects of those sudden and strong passions to which men are exposed, and which sometimes find vent in the exercise of legislative power:

That it is the duty and within the power of the Supreme Court of the United States (a proper case being before it) to crush with its annulling edict any statute, State or Federal, in conflict with the national organic law:

That the Supreme Court has been ordained by the fundamental law as the arbiter for the final determination of all questions arising under it, and that its judgments are entitled not only to respect, but to willing obedience, with the unvarying consequence that in all the broad domain of the Republic no authority, judicial or executive, Federal or State, recognizes or presumes to enforce any enactment, whether of Congress or of a State legislature, which has been declared by that court to be repugnant to the Constitution of the United States; and, if unrepealed, it retains its place upon the statute book, its presence there serves only as a warning of the fate which threatens all acts of legislation in disregard of the prohibitions or limitations of the supreme law of the land.

And it is due to the implicit and universal acceptance of these teachings of the great Chief Justice that the Nation to-day stands at pause and awaits the adjudication of that high tribunal which shall define its lawful relations to peoples, until just now groaning under chains of medieval tyranny, but for whose future the fortunes of war have cast upon us some measure, at least, of responsibility. And, whatever shall be the nature of that determination,

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the policy of the government, in all its departments, will, supported by a harmony of public opinion, marred by no discordant note, be directed along its lines.

The extraordinary influence of Marshall's judicial work is to be ascribed to his possession of reasoning powers of remarkable capacity, a character of unchallenged integrity, a moral courage which never quailed, and a devotion to the institutions of his country which animated every act of his official life. His impartiality was conceded by all. The processes of reasoning, through which, step by step, he reached a conclusion, were so accurate in their logical sequence that the intellect could detect no flaw. He convinced the mind if he did not convert the heart.

From premise to conclusion the progress of his logic was like the movement of a mighty river, gathering strength and volume in its ever-broadening, ever-deepening flow, until, at the last, it glides through the placid estuary into its appointed harbor.

His immortal expositions of the Constitution are marked by a clearness of style which is unsurpassed. The mind follows easily the thread of his argument, even when dealing with the most complex or abstruse subject. A favorite expression was, "It is admitted." This provoked the remark: "Once admit his premises, and you are forced to his conclusion; therefore deny everything he says." And Daniel Webster said to Justice Story: "When Judge Marshall says, 'It is admitted,' sir, I am preparing for a bomb to burst over my head and demolish all my points."

His disposition was most amiable. He never had a personal enemy in his life. Story, in writing to a friend, said: "I think he is the most extraordinary man I ever

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saw, for the depth and tenderness of his feeling." His manner on the Bench was dignified, but he was a most patient listener. One who knew him well says that no symptom of irritation was ever betrayed in his movements, no frown of impatience ever clouded his brow.

The domestic life of every man is his own hallowed possession. Its joys and sorrows, its hopes and disappointments, may rightfully abide secure within that threshold whose door screens from public view the inviolable privacy of the home, into whose consecrated precincts no man unbidden may dare intrude.

But there are sometimes graciously afforded to a people glimpses of the inner life of one whose illustrious achievements have gained for him their reverence and gratitude; and if there be revealed to them the exhibitions of a pure and tender heart, the character whose strength commanded their homage is not thereby weakened, but rounded out and glorified, and their affections are won, their love compelled, as the uplifted veil discovers the object of their admiration justly crowned with that loftiest of panegyrics: *Integer vitae scelerisque purus.*

Let the voice be hushed, and the foot fall more lightly, as the door is opened by a friendly hand, and we approach the *sacra arcana* of the household, for the place whereon we stand is holy ground.

The Chief Justice died in 1835, in the eightieth year of his age. To the last, the brilliancy of his intellect remained undimmed, its acuteness undulled, its vigor unimpaired.

Monuments and statues have been erected to commemorate his worth. Suitable inscriptions record his virtues and his noble deeds. The ravages of time may reduce these material symbols of veneration to their primeval

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atoms, but his memory shall find perennial welcome and abiding habitation in the hearts of his countrymen. And the enjoyment of the fruits of those priceless services which he was able to render to his country shall excite the deep, enduring gratitude of ages yet slumbering in the ventricle of time.

"Nothing can cover his high fame but heaven;
No pyramids set off his memories
But the eternal substance of his greatness;
To which I leave him."

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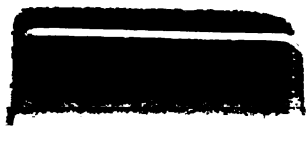

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